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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. [redacted] 111

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE SWITZERLAND MARINE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 12, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 382.

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE SWITZERLAND MARINE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and the western division of the southern district of Ohio, begun and held at the court-rooms, in the city of Cincinnati, in said division and district aforesaid, on the first Tuesday of February, being also the third day of that month, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and ninth year of the Independence of the United States of America—present, the Honorable George R. Sage, one of the judges—among the proceedings had were the following, to wit:

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } No. 3230.

Money. Removed from the superior court of Cincinnati.

Be it remembered that heretofore, to wit, on the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-two, came the defendant herein aforesaid, by Lincoln, Stephens and Slatterly, its attorneys, and filed in the office of the clerk of the court aforesaid in this cause the certain transcript of proceeding had in this cause in the superior court of Cincinnati, and
2 which said transcript so as aforesaid filed is clothed in the words and figures as follows, to wit:

3 *Petition.*

STATE OF OHIO, *Hamilton County:*

Superior Court of Cincinnati.

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
against
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, Defendant. } 36579.

The plaintiff states that it is a corporation, having its principal office at Zurich, Switzerland, and that the defendant is a corporation of the State of Kentucky; that on the 10th day of December, A. D. 1880, one C. G. Megrue, a travelling agent for the firm of Aiken, Lambert & Company, of New York city, became a passenger on one of the trains of the defendant at Cincinnati, bound for Louisville, in said State of Kentucky; that said defendant is and was at said date a common carrier of passengers, merchandise, and baggage; that said Megrue had purchased of said defendant a first-class ticket from Cincinnati to Louisville, entitling him to ride upon said
4 train and have his trunks and baggage carried in the baggage car attached to said train; that just previous to boarding said train said Megrue delivered to the defendant, as such common car-

rier, a trunk containing, among other baggage, a large and valuable collection of watches and jewelry used as samples in his trade, the property of said Aiken, Lambert and Company, contained in what is known and recognized as a sample trunk, and said defendant took the same into its possession and checked it as the baggage of said Megrue and agreed to carry the same safely to said city of Louisville and there deliver to said Megrue within a reasonable time; that, disregarding its duty in that regard, said defendant never delivered said trunk nor its contents nor any part thereof in accordance with its said contract, but, on the contrary, said baggage car and said trunk and all its contents were, on the 11th day of December, 1880, destroyed by fire, which occurred through the negligent piling of combustible substances around the stove in said car and the negligent keeping of the fire in said stove by the defendant
5 and through the neglect of efforts to extinguish said fire; that the value of said goods so consumed was sixty-five hundred dollars; that the plaintiff was and is engaged in the business of fire and marine insurance, and, by a policy in force at the time of the above-mentioned loss, had insured the said Aiken, Lambert and Co. against loss by fire to said goods and, upon proof of loss, paid said firm the sum of $5,847.79 as the amount of said loss; that said policy contained a clause requiring the assured to subrogate said company to all claims against transporters said firm or assured might have arising out of destructing of said goods, and said claim has been assigned to plaintiff, who is now sole owner thereof.

Wherefore plaintiff demands judgment against said defendant for said sum of $5,847.79, with interest from January 1st, 1881, and costs.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Plaintiff.

6 STATE OF OHIO, }
Hamilton County, } *ss:*

C. B. Matthews, being first duly sworn, says that he is one of the attorneys for the plaintiff, which is a foreign corporation, having no officer or agent within the State of Ohio, and that the allegations of the foregoing petition are true, as he verily believes.

C. B. MATTHEWS.

Sworn to before me and subscribed in my presence this 16th day of April, A. D. 1881.

[SEAL.] EDWARD F. MATTHEWS,
Notary Public in and for Hamilton County, State of Ohio.

Said petition contained the following endorsement, to wit: Superior court of Cincinnati. No. 36579. The Switzerland Marine Insurance — *vs.* The Louisville, Cincinnati & Lexington R'y Co. Petition. Filed April 6th, 1881. Samuel W. Ramp, clerk. Issue summons, returnable according to law. Action for money only. Amount claimed, $5,847.79, with interest from Jan'y 1st, 1881. Matthews, Ramsey & Matthews, att'ys for plaintiff.

7 THE STATE OF OHIO,
Hamilton County, City of Cincinnati:

The Superior Court of Cincinnati.

To the sheriff of the county of Hamilton:

You are commanded to notify The Louisville, Cincinnati & Lexington Railway Company, a corporation, defendant, that it has been sued by The Switzerland Marine Insurance Company, plaintiff, in the superior court of Cincinnati, and that unless it answer by the 14th day of May, A. D. 1881, the petition of the said plaintiff against it filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 25th day of April, A. D. 1881.

Witness my hand and the seal of said court, at Cincinnati, this 16th day of April, A. D. 1881.

[SEAL.]

SAMUEL W. RAMP,
Clerk of the Superior Court of Cincinnati,
By EMIL HOFFMAN, *Deputy.*

8 Said summons contained the following endorsement, to wit: Superior court of Cincinnati. No. 36579. The Switzerland Marine Insurance Company, plaintiff, against The Louisville, Cincinnati and Lexington Railway Company, defendant. Summons in action for the recovery of money only. Amount claimed, $5,847.79, with interest from the first day of January, 1881, for which judgment will be taken if you fail to answer. To 25th day of April, 1881. Matthews, Ramsey & Matthews, att'ys.

APRIL 23D, 1881.

Served the within-named the Louisville, Cincinnati & Lexington Railway Company, a corporation, with a true copy of this writ by delivering the same personally to Brent Arnold, general agent for said company, and who was found in charge of its office, no chief officer being found.

SAMUEL BAILEY, JR., *Sheriff,*
By F. E. SCOBY, *Deputy.*

Filed April 25th, 1881.

SAMUEL W. RAMP, *Clerk.*

9 *Motion.*

Superior Court of Cincinnati, Ohio.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY. } 36579.

Now comes the defendant and moves the court that the plaintiff be required to make its petition more definite and certain by setting

out a detailed statement or account of the number, character, and value of the watches and of the character and value of the jewelry and of all articles of property in the said trunk contained.

2. And defendant further moves that plaintiff be required to produce and file a copy of the policy under which its right accrued.

LINCOLN, STEPHENS AND SLATTERY,
Attorneys for Defendant.

Endorsed as follows, to wit: Motion. Filed May 14th, 1881. Samuel W. Ramp, clerk.

10 *Entry.*

Superior Court of Cincinnati, Ohio.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE L., C. & L. R. R. Co. } 36579.

This cause came on for hearing upon the motion of defendant that plaintiff be required to make its petition definite and certain by setting out a detailed statement or account of the number, character, and value of the watches and of the character and value of the jewelry and of all other articles of property in the said trunk contained; and the court, being fully advised in the premises, grant said motion, and the motion of the defendant that plaintiff be required to produce and file a copy of the policy under which its right accrued is overruled.

Endorsed as follows, to wit: "Entry." Entered June, 1881, 25th. 814.

11 *Entry.*

Superior Court of Cincinnati.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 36579.

Amended petition is now filed by leave.

Endorsed as follows, to wit: "Entry." Entered 1881, October 6th. M. 146.

12 *Amended Petition.*

STATE OF OHIO, *Hamilton County:*

Superior Court of Cincinnati.

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
against
THE LOUISVILLE, CINCINNATI AND LEXINGTON R'Y CO. } 36579.

The plaintiff states that it is a corporation, having its principal office at Zurich, Switzerland, and that the defendant is a corporation of the State of Kentucky.

That on the tenth day of December, A. D. 1880, one C. G. Megrue, a travelling agent for the firm of Aiken, Lambert and Company, of New York city, became a passenger on one of the trains of the defendant at Cincinnati, bound for Louisville, in said State of Kentucky; that said defendant is and was at said date a common carrier of passengers, merchandize, and baggage; that said Megrue had purchased of said defendant a first-class ticket from Cincinnati to
13 Louisville, entitling him to ride upon said train and have his trunks and baggage carried in the baggage car attached to said train; that just previous to boarding said train said Megrue delivered to the defendant, as such common carrier, a trunk containing, among other baggage, a large and valuable collection of watches and jewelry, which are more particularly set out in Exhibits "A" & "B," hereto attached and made part of this amended petition, and which were used as samples in his trade, the property of said Aiken, Lambert and Company, contained in what is known and recognized as a sample trunk, and said defendant took the same into its possession and checked it as the baggage of said Megrue and agreed to carry the same safely to said city of Louisville and there deliver to said Megrue within a reasonable time.

That, disregarding its duty in that regard, said defendant never delivered said trunk or its contents or any part thereof in accordance with its said contract, but, on the contrary, said baggage car
14 and said trunk and all its contents were, on the 11th day of December, 1880, destroyed by fire, which occurred through the negligent piling of combustible substances around the stove in said car and the negligent keeping of the fire in said stove by the defendant and through the neglect of efforts to extinguish said fire.

That the value of said goods so consumed was $5,977.43, which is set forth more fully and particularly in Exhibit "A," a statement of the watches, and "B," a statement of the jewelry, contained in said trunk at the time of said fire, said exhibits being hereto attached and made part hereof.

That the plaintiff was and is engaged in the business of fire and marine insurance, and by a policy in force at the time of the above-mentioned loss had insured the said Aiken, Lambert and Company

against loss by fire to said goods, and, upon proof of loss, paid said firm the sum of $5,847.79 as the amount of said loss.

That said policy contained a clause requiring the assured to subrogate said company to all claims against transporters said firm as assured might have arising out of the destruction of said goods, and said claim has been assigned to plaintiff, who is now sole owner thereof.

Wherefore plaintiff demands judgment against said defendant for said sum of $5,847.79, with interest from January 1st, 1881, and costs.

RAMSEY, MATTHEWS AND MATTHEWS,
Att'ys for Plaintiff.

STATE OF OHIO, *Hamilton County,* } ss:

C. B. Matthews, being first duly sworn, says that he is one of the attorneys for the plaintiff, which is a foreign corporation, having no officer or agent within the State of Ohio, and that the allegations of the foregoing amended petition are true, as he verily believes.

C. B. MATTHEWS.

Sworn to before me and subscribed in my presence this 5th day of October, A. D. 1881.

[SEAL.]

MATTHEW J. DAY,
Notary Public, Ham. Co., O.

EXHIBIT "A."

62225	1	18 k., P. F., 20 l., P. Breton	52 14
55511	1	" " nickel	63 42
62216	1	14 Hig., "	58 52
52084	1	18 " " " "	98 04
40283	1	" " " " "	109 89
55519	1	" " " " "	76 16
95235	1	14 " " Longines, S. W.	54 50
12532	1	" P. F., " Excelsior	30 25
67177	1	" Hig., 10 l., P. Breton	39 60
66871	1	18 " " "	46 09
67192	1	" " " "	46 75
89536	1	10 " 17 l., Longines	29 19
40706	1	18 " 10 l., Ch. Latom	77 69
96672			
5346	1	Eagle, Agassiz, nickel	28 71
96700			
4738	1	" " gilt	26 95
55234	1	" Ch. Latom	29 44
62019	1	3z., Eagle, 20 l., P. Breton	21 42
61529	1	4z., " " "	24 64
67269	1	3z., " " " nickel	24 24

64175	1	3z., Eagle, 20 l., P. Breton, nickel	15 67	
80445	1	Sil., P. F., " " Ch. Latom	24 88	
75189	1	" " " " "	24 88	
78330	1	" " " " "	22 04	
58151	1	" " " Longines	9 90	
132644	1	" Hig., 10 l., "	13 20	
12040	1	Sil., O. F., 14 l., cyl.	11 00	
13421	1	Sil., O. F., 17 l., S. W.	11 00	
17	1	N. P., P. F., 18 l., I., Longines, bl'k D.	7 70	
	1	N. P., P. F., 18 l., I., bl'k D.	7 42	
	1	" ½, " " Champion, D.	7 15	
	1	" " " 15 l., cylinder	6 32	
	1	" " " 18 l., Excelsior, ind.	6 87	
				1,115 77
	1	N. P., P. F., 10 l., Excelsior, green	8 25	
	1	Hamp. W. Co., mort., nickel, 15 jew.	11 99	
	1	Culver "	15 84	
	1	Taylor	12 87	
	1	Wheeler " S. W.	11 88	
	1	80 "	16 33	
	1	1 "	10 89	
	1	2	12 87	
	1	3	16 83	
	1	47	19 30	
	1	49	24 64	
	1	Lady Elgin	11 88	
	1	Dexter St.	6 93	
	1	Ab't 2 oz., P. F. sh., S. W.	4 99	
	1	4z. " G. J., S. W.	8 25	
	1	5z. " Hig. "	8 98	
	1	" " P. F. "	8 99	
133268	1	14 k. Hig. 15 l. Longines, S. W.	30 25	
18		For'd		1,115 77
44908	1	14½ P. F., 13 l., Remonstori	22 00	
	1	7 P. F., 14 l., Excelsior	14 85	
	1	" " bl'k D.	15 40	
	1	Boss Hig. border	23 92	
	1	Studley	8 25	
	1	" S. W.	11 27	
	1	No. 87	8 27	
	1	Studley, S. W.	11 27	
	1	Springfield, S. W.	6 43	
	1	N. P. ½ P. F., 15 l., cyl. bl'k D.	7 15	
	1	" " "	7 15	
	1	N. P. ½ P. F., 15 l., cyl. gilt.	5 50	
	1	Sil. P. F., 20 l., chronograph	34 10	
	1	" " "	34 10	
				451 62
				1,567 39

	1	P. S. B., S. W.	12 80		
	1	3z. Hig., G. J.	6 06		
	1	4z. " S. J.	7 17		
	1	2½z. P. F., Dueber, 16 size	6 56		
	1	Sil. " 20 l., Excelsior	11 27		
	2	N. P. " 19 l., Champion	13 20		
	1	3z. " S. J.	5 77		
	1	N. P. " 20 l., Longines	9 42		
	1	H. W. Co., 11 jew.	10 72		
	1	# 81	8 41		
	1	82	11 88		
19		For'd			1,567 39
	89297	41 ⅞ dwt., 14 k. case, 26.80, 4.50, 1.50, gold-making eng.	36 08		
66819	42	⅞ dwt., 14 k. case, 27.44, 4.50, 1.50	36 78		
93226	43	⅜ " " 27.76, 5.50, 1.50	38 23		
101571	49	" " 31.36, 5.50, 1.50	42 19		
106949	20	¾ " " 13.04, 4.50, 1.50	20 94		
97804	20	⅛ " " 12.88, 5.50	20 21		
97807	20	⅛ " " 12.88, 5.50, 1.50	21 86		
97770	19	⅝ " " 12.72, 5.50, 1.50	21 69		
	2	Ellery	12 93		
	1	Hayward, S. W.	8 25		
	2	Studley	16 50		
	1	Wheeler	8 41		
38876	1	Sil. Hig., 20 l., Longines	15 69		
107995	1	" P. F., " " S. W.	11 71		
32916	1	" Hig., Brandt	6 87		
17446	1	" " Excelsior	11 27		
	2	Joint Amer. nickel, 3.30	6 60		
	3	" " gilt, 3.30	9 90		
	6	N. P. P. F., 20 l., Longines	41 25		
	6	" " 19 l., Champion	36 30		
					524 92
					2,092 31
	6	N. P. P. F., 19 l., anem.	33 00		
	1	" " 14 l., cyl.	5 77		
	1	" " 13 l., "	5 77		
	1	Boss Hig., 10 l. size, S. W.	21 45		
20		For'd			2,092 31
	2	Ab't 2 oz., P. F. ac.	6 60		
	3	3 oz. " "	14 48		
	3	" " G. J.	18 18		
	2	2 oz., Hig. ac.	7 67		
	2	3 oz., " "	9 65		
	1	3 oz., " G. J.	6 06		
	1	4 oz., " "	7 50		
					136 13
					2,228 44

EXHIBIT "B."

Plated sets		222 05	
" shawl pins		122 90	
" cuff pins		17 83	
" charms		84 86	
F. G. bars		44	
Pet "		4 22	
" attach chains		4 49	
" swivels		2 49	
" spring rings		1 18	
" snap		40	
" jump		84	
" split		1 36	
" bracelet chains		1 45	
" eyeglass "		71	
" studs		12 45	
" sc'f rings		13	
Pl't. sc'f pins		18 86	
" 3 lik		1 80	
Pl't. c. butt's		24 21	
21 Gold set		196 41	
" sh. pin		53 70	
Gold studs		55 18	
" c. butt's		44 14	
" s. butt's		56 14	
Ribbon chain		22 15	
Pl't. neck "		102 12	
F. G. " "		12 26	
Pl't. crosses		20 83	
" s. butt's		91 58	
" drops		46 14	
Gold "		104 30	
" emb. pins		40 30	
			1,368 00
Silver split rings		93	
Gold " "		1 18	
" bracelet chains		7 11	
" glass "		3 30	
" neck "		175 28	
" pins		4 48	
" snaps		17 19	
" sc'f pins		18 46	
Pl't. locket		82 48	
Gold locket		65 04	
22 For.			1,368 00
Pl't. E. drops		51 13	
" "		2 01	
F. G. seals		59	

Silver jump rings	94	
Pl't. chain mountings	37	
Nick. spring rings	20	
" swivels	03	
Pl't. pins	2 90	
Stud spirals	14	
Silver keys	88	
Pl't. hooks	2 90	
F. G. swivels	19	
Hairpins	2 22	
Sil'r hooks	2 51	
Gold crosses	12 78	
" charms	42 88	
" cuff pins	34 03	
" keystone	13 95	
" hoops	4 50	
Coral arm	2 73	
Gold key	2 75	
" spring rings	10 20	
		562 36
		1,930 36
Gold swivels	7 41	
Gold E. drops	11 81	
23 For'd		1,930 36
F. G. vest chain	17 60	
Silver vest chain	40 30	
Pl't. guard	43 95	
Bracelets	36 61	
Rings	559 67	
Silver E. drops	1 11	
Filled rings	96 77	
Band "	186 58	
Sett "	32 40	
Guard "	5 37	
C. ex. setts	85	
Thimbles	147 79	
Gold guard chain	223 59	
" vest "	136 69	
14 k. S. guard chain	52 17	
Cell vest " "	18 00	
" guard "	3 09	
Comb setts	3 22	
Nick. vests	1 38	
Pl't. knobs	7 22	
Silv. bracelets	2 56	
Gold E. hooks	23	
Scale rings	13 62	
Silver chain	7 89	
Gold E. wires	10	

24	For'd		1,930 36
	Solid silver ex. cases	7 19	
	" " screw flat case	3 72	
	" " hol.	69	
	Pens only	27 03	
	Rubber sys. case	3 03	
			1,699 64
			3,630 00
	Pl't. telescope case	1 23	
	" eng. screw pencil	83	
	Hammer, hatchet, ax, wood screw	5 32	
	Stylographic pens	4 40	
	Celluloid holders	65	
	Pl't. vest chains	106 56	
			118 99
			3,748 99

Endorsed as follows, to wit: Amended petition. 1881, Oct. 6th. M. 146. Filed by leave. S. W. Ramp, clerk. Baker, deputy.

25 *Petition for Removal.*

STATE OF OHIO, *Hamilton County:*

Superior Court of Cincinnati.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 36579.

Petition for the removal to the United States circuit court for the southern district of Ohio, western division.

Your petitioner, the above-named defendant, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds the sum of five hundred dollars, exclusive of costs; that the controversy in the said suit is between a citizen of the State of Kentucky and a citizen of a foreign power, to wit, of the Republic of Switzerland.

That the petitioner was at the time of the commencement of this suit and still is a corporation duly established by the laws
26 of Kentucky, having its principal office and place of business in Louisville, Kentucky, and was at the time of the commencement of this suit and still is a citizen of that State; that the Switzerland Marine Insurance Company, the plaintiff in this suit, was at the time of the commencement of this suit and still is a corporation under the laws of the Republic of Switzerland, having its principal office and place of business at Zurich, Switzerland, and

was at the time of the commencement of this suit and still is a citizen of the said foreign power, the Republic of Switzerland, and that the stockholders and proprietors thereof were at said times and now are citizens of said Republic of Switzerland.

And your petitioner offers herewith a bond and a sufficient surety for his entering in the said circuit court of the United States for the southern district of Ohio and western division thereof, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly
27 removed thereto.

And your petitioner prays this honorable court to proceed no farther herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the said southern district of Ohio, and to the western division thereof; and he will ever pray.

—— ——,
—— ——,
Attorneys for Petitioner.

STATE OF OHIO, } ss:
Hamilton County, }

Brent Arnold, being duly sworn, says that he is the general agent of the Louisville, Cincinnati and Lexington Railway Company in Cincinnati and the party upon whom the process in this suit was served; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, as he verily believes.

BRENT ARNOLD.

28 Subscribed in my presence and sworn to before me this 21st day of October, 1881.

[SEAL.] S. W. SMITH, JR.,
Notary Public, Hamilton County, Ohio.

Endorsed as follows, to wit: Petition for removal. Filed October 24th, 1881. S. W. Ramp, clerk. —— Baker, deputy.

29 Know all men by these presents that we, the Louisville, Cincinnati and Lexington Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto the Switzerland Marine Insurance Company in the penal sum of one thousand dollars; the payment whereof, well and truly to be made unto the said The Switzerland Marine Insurance Company and its successors, we bind ourselves, our successors, executors, administrators, heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said The Louisville, Cincinnati and Lexington Railway Company having petitioned the superior court of Cincinnati, in Hamilton county, State of Ohio, for the re-

moval of a certain cause therein pending, wherein The Switzerland Marine Insurance Company is plaintiff and The Louisville, Cincinnati and Lexington Railway Company is defendant, to the circuit court of the United States in and for the southern district of Ohio, and the western division thereof:

30 Now, if the said The Louisville, Cincinnati and Lexington Railway Company, your petitioners, shall enter in the said circuit court of the United States and the western division thereof, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

In witness whereof the said The Louisville, Cincinnati and Lexington Railway Company has caused its name to be signed and its seal to be affixed thereto by E. P. Alexander, its president, who is duly authorized so to do, and the said E. P. Alexander has hereto set his hand and seal this 18th day of October, A. D. 1881.

[Seal R'y Co.]

LOUISVILLE, CINCINNATI AND LEXINGTON R'Y CO.,
By E. P. ALEXANDER, *Pres'd't.* [SEAL.]
E. C. BUSH. [SEAL.]

Attest: EASTWOOD, *Sec't'y.*

31 STATE OF OHIO, } *ss:*
Hamilton County, }

I, E. C. Bush, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Ohio and a property-holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Ohio liable to execution of the value of more than five hundred dollars.

E. C. BUSH.

Subscribed in my presence and sworn to before me this 22nd day of October, A. D. 1881.

[SEAL.]

S. W. SMITH, JR.,
Notary Public, Ham. Co., Ohio.

32 *Entry.*

STATE OF OHIO, *Hamilton County:*

Superior Court of Cincinnati.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 36579.

This cause came on for hearing upon the petition of the defendant, The Louisville, Cincinnati and Lexington Railway Company, to remove this cause to the circuit court of the United States for the southern district of Ohio, and the western division thereof; and it appearing in and by said petition that the amount involved in said suit exceeds the sum of five hundred dollars, exclusive of costs; that the controversy is between citizens of the United States and citizens of a foreign State; that the plaintiff, The Switzerland Marine Insurance Company, was at the time of the commencement of this suit and still is a corporation under the laws of the Re-
33 public of Switzerland, having its principal office and place of business at Zurich, Switzerland, and was at the time of the commencement of this suit and still is a citizen of the said foreign power, the Republic of Switzerland, and that the stockholders and proprietors thereof were at said time and now are citizens of said Republic of Switzerland; that the petitioner, The Louisville, Cincinnati and Lexington Railway Company, the defendant herein, was at the time of the commencement of this suit and still is a corporation duly established under the laws of the State of Kentucky and a citizen of that State; and the said railway company having prayed in said petition that this cause be removed and that this court proceed no farther herein, and having made and filed with its petition a bond, with good and sufficient surety, in accordance with the statutes of the United States in such cases made and provided, and this being the first term at which, according to the practice of the court, this case could be tried, it is hereby ordered that further proceedings herein in this court be stayed until further order.

34 STATE OF OHIO, }
Hamilton County, City of Cincinnati, } *ss:*

I, Samuel A. Ramp, clerk of the superior court of Cincinnati, Ohio, do hereby certify the above and foregoing to be true and correct copies of all process, pleadings, depositions, testimony, and other proceedings in the case No. 36579, wherein The Switzerland Marine Insurance Company is plaintiff and The Louisville, Cincinnati and Lexington Railway Company is defendant, as appears from the files and records now in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 26th day of October, A. D. 1881.

[SEAL.]

SAMUEL W. RAMP,
Clerk of the Superior Court of Cincinnati, Ohio,
By HARRY J. ASHTON, *Deputy.*

35 And afterward, to wit, on the thirtieth day of September, in the year last aforesaid, came the said defendant aforesaid, by its said attorneys aforesaid, and filed in the said the clerk's office of the court aforesaid in this cause its certain motion, and which said motion so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion.

U. S. Circuit Court, S. D. O., W. D.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY.

Now comes the defendant and moves that this cause be transferred to the equity docket of this court, and that the plaintiff be required to reform its petition so as to make the same a bill in equity.

LINCOLN, STEPHENS AND SLATTERY,
Solicitors for Defendants.

And afterward, to wit, on the 4th day of October, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry U, 451.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

36 Money.

This cause came on for hearing upon the motion of the defendant to require the plaintiff to state *his* cause of action as a bill in equity and to transfer the cause to the equity docket, and the court, being fully advised in the premises, do overrule the said motion; to which overruling the said motion the defendant excepts, and the defendant *have* twenty days to file an answer.

And afterward, to wit, on the 24th day of October, in the year last aforesaid, came the said defendant herein aforesaid, by its said attorneys, and filed in the clerk's office of the court aforesaid in this cause its certain answer, and which said answer so as aforesaid filed is clothed in the words and figures as follows, to wit:

37 *Answer.*

Circuit Court of the United States, Southern District of Ohio, W. D.

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, Defendant. } No. 3230.

Now comes the defendant, The Louisville, Cincinnati and Lexington Railway Company, and, excepting to the right of the plaintiff to proceed in this case at law or before court and jury, and protesting against proceeding herein except as in a court of equity, and without waiving such exception and protestation, and being required to answer to the petition, say- that defendant admits that on the 10th day of December, A. D. 1880, one C. G. Megrue, a traveling agent for the firm of Aiken, Lambert & Co., of the city of New York, became a passenger on one of the trains of defendant at Cincinnati, Ohio, bound for Louisville, in the State of Kentucky;

38 that the said defendant was at that date a common carrier of passengers and merchandise and baggage; that said Megrue had purchased a first-class ticket from Cincinnati to Louisville, entitling him to ride upon the said train and to have the just amount of baggage incident to his trip as such passenger carried on said train; but the defendant denies that said Megrue had any right under and by virtue of his purchase of said ticket to have any other than such trunk or baggage carried.

The defendant further admits that, just previous to boarding the said train, said Megrue shipped a trunk, but not a large one, as baggage, but as to the contents of which the defendant's agent had no knowledge, and supposed the said trunk to contain the personal baggage or effects of the said Megrue; but defendant denies that it had knowledge that said trunk was one of such trunks as are used for samples in the jewelry trade.

The defendant admits that the trunk so shipped and supposed by its agents to contain baggage was received from said Megrue

39 and checked as his baggage, and that the defendants undertook to carry the same, supposing it to be baggage, to Louisville within a reasonable time, and that the baggage car in which said trunk was shipped caught fire, and that the said trunk, with its contents, was greatly damaged thereby; but the defendant denies that the said trunk and its contents were wholly destroyed, and it denies that the said fire was caused by the negligent piling of combustible substances around the stove in said car and the negligent

keeping of the fire in said stove, or that the loss occurred through any neglect of efforts on the part of defendant to extinguish the said fire.

The defendant says that it has no knowledge of the value of the watches and jewelry contained in said trunk, and therefore denies the allegations relating thereto.

Defendant further says that it has no knowledge of the business in which the plaintiff is engaged, or that plaintiff had insured the said goods for the said Aiken, Lambert & Co. against loss by fire, or that the policy of insurance contained the clause as to subro-
40 gation, or that the claim has been paid said firm of Aiken, Lambert & Co. and by them assigned to said plaintiff, and therefore demands strict proof thereof.

And the defendant denies each and every allegation in said amended petition contained not specifically admitted and all the other facts in the case; and, having fully answered, prays to be hence dismissed with costs.

LINCOLN, STEPHENS & SLATTERY,
Attorneys for Defendant.

STATE OF KENTUCKY, } ss:
County of Jefferson, }

M. H. Smith, being duly sworn, says that he is the president of said defendant, The Louisville, Cincinnati and Lexington Railway Company, a corporation under the laws of Kentucky, and that the several matters and things in the foregoing answered contained are true, as he believes.

M. H. SMITH.

41 Signed in my presence and sworn to before me this 20th day of October, 1882.

[SEAL.] A. M. QUARRIER,
Notary Public, J. C., Ky.

42 And afterward, to wit, on the 23d day of November, in the year last aforesaid, came the said defendant aforesaid, by its said attorneys, and filed in the office of the clerk of the court aforesaid in this cause its certain motion, and which said motion so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion.

United States Circuit Court for the Southern District of Ohio, W. D.

SWITZERLAND MARINE INS. CO.
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILROAD CO.

Now comes the defendant and moves the court to set aside the entry heretofore made in this case at this term of the court and to transfer the same to the equity docket.

LINCOLN, STEPHENS AND SLATTERY,
Counsel for the Defendant.

And afterward, to wit, on the 2d day of January, A. D. 1883, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
43 THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

This cause came on for hearing upon the motion to set aside the entry made at this term and to transfer the same to the equity docket, and the court, being fully advised in the premises, do grant the said motion and order the case to be transferred to the equity docket.

And afterward, to wit, on the 5th day of February, A. D. 1884, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry V, 246.

THE SWITZERLAND MARINE INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

Upon application of counsel for plaintiff and by consent of counsel for defendant it is ordered that this cause be, and the same hereby is, transferred back to the law side of the docket of this court.

And afterward, to wit, on the 5th day of February, A. D. 1885, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the
44 words and figures as follows, to wit:

Journal Entry W, 39.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

This day came the parties, by their attorneys, and thereupon, to try the issues joined, a jury being called came, to wit, Lewis G. Van

Winkle, Julius Williams, H. M. Chew, Joseph F. Wilson, George E. Stevens, Martin Shewman, Harrison Hart, John F. Law, Elias Favorite, Bernard Mescher, James S. Elliott, and George Norman, who were duly empanneled and sworn well and truly to try the issues joined between the parties, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards to wit, on the 6th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 39.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY. } 3230.

Money.

This day again came the parties, by their attorneys, also the
45 jurors heretofore empanneled and sworn herein, and, the testimony being finished, but the arguments of counsel not concluded, the court respited the jury until Monday morning next at ten o'clock, to which time this cause is continued.

And afterward, to wit, on the 9th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry upon which said journal so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 41.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD CO. } 3230.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empanneled and sworn herein, but, the arguments of counsel not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterward, to wit, on the 10th day of February, in the year last aforesaid, an entry was made upon the journal of the court

aforesaid, and which said entry so as aforesaid made is clothed
46 in the words and figures as follows, to wit:

Journal Entry W, 42.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

This day again came the parties herein, by their attorneys, also the jurors heretofore empanneled and sworn herein, but, the arguments of counsel not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterward, to wit, on the 11th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry upon which said journal so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 42.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empanneled and sworn herein, who, having heard the evidence, the arguments of counsel, and the charge of the court, do find the issues joined to be in favor of the plaintiff, and assess
47 its damages by reason of the premises at the sum of forty-nine hundred fifty-five & $\frac{63}{100}$ ($4,955.63) dollars, with interest from January 1st, 1881. Whereupon the jury was directed to retire to their room and answer in writing the questions submitted to them by the court.

And afterward, to wit, on the 12th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid, made is clothed in the words and figures as follows, to wit:

Journal Entry W, 44.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empanneled and sworn herein, and returned to the court the written questions submitted to them, with their answers thereto, as follows:

Question first. What was the value of the contents of the trunk destroyed, after deducting salvage?

Answer. $4,955.63.

Question 2nd. Did the checking agent have notice when he checked the trunk that it contained jewelry or property other than the personal baggage of Megrue?

Answer. No.

48 If yea, was that notice conveyed by the appearance of the trunk or was it by any statement made to said agent? State which.

Question 3rd. At the time of the checking of said trunk and prior thereto was it the custom of the defendant to carry as baggage and without extra charge, excepting on account of extra weight, drummers' trunks containing merchandize, knowing that they were drummers' trunks and that they contained merchandize?

Answer. Yes.

Question 4th. Was the loss of said trunk occasioned by the gross negligence of the defendant?

Answer. Yes.

Question 5th. Did the defendant exercise ordinary care as to the trunk which, with its contents, was lost—that is, such care as a prudent man would exercise in like circumstances with reference to his own property?

Answer. No.

And afterward, to wit, on the day and year last aforesaid, came the said defendant herein aforesaid, by its said attorneys, and filed in the clerk's office of the court aforesaid in this cause its certain motion, and which said motion so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion.

United States Circuit Court, S. D. of O., W. D.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE & NASHVILLE R. R. CO. } 3230.

Motion for new trial and also to set aside 3rd, 4th, and 5th findings.

49 Now comes the defendant and moves the court to set aside the verdict heretofore obtained in the above cause and to grant a new trial for the following reasons, to wit:

1st. The court erred in receiving evidence objected to by the defendant.

2d. The court erred in excluding evidence offered by the defendant.

3rd. The verdict was against the weight of the evidence.

4th. The verdict is not sustained by the evidence.

5th. There is not sufficient evidence to sustain the 3rd, 4th, & 5th findings, as to each of which the defendant moves to set them aside.

6th. The court erred in its general charge to the jury.

7th. The court erred in refusing charges & qualifying charges offered by the defendant.

LINCOLN, STEPHENS AND LINCOLN,
Counsel for the Defendant.

And afterward, to wit, on the 28th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 79.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3230.

Money.

50 This cause came on to be heard on the motion of the defendant to set aside the verdict, and also to set aside the special findings of the jury, and was argued by counsel, and the court, being fully advised in the premises, do grant the said motion as to the finding No. 4 of gross negligence of the defendant and set the same aside, and do overrule the said motion as to the general verdict and the other special findings; to which overruling counsel for the defendant excepted, and the plaintiff excepted to the setting aside of special finding No. 4 as above.

And the cause coming on further for hearing upon the record and verdict, it is ordered and adjudged that the plaintiff recover of the defendant the sum of sixty-one hundred and seventy-two & $\frac{24}{100}$ ($6,172.24) dollars, with interest from February 3rd, 1885, and the costs, to be taxed by the clerk, to which the defendant excepted; and the defendant in open court prayed for the allowance of a writ of error to the Supreme Court, which is allowed, and bond for costs is fixed at $500; and the court allows sixty days for the filing of bond for costs and a supersedeas bond, for which time execution is stayed.

51 And afterward, to wit, on the 30th day of March, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry upon which said journal so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 80.

THE SWITZERLAND MARINE INS. CO.
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY. } 3220.

Money.

In this case the court signs, seals, and allows a bill of exceptions, and orders it to be made a part of the record in the cause.

And thereupon, to wit, on the day and year last aforesaid, came the said defendant herein, by its attorneys aforesaid, and filed in the clerk's office of the court aforesaid in this cause its certain bill of exceptions, and which said bill of exceptions so as aforesaid filed is clothed in the words and figures as follows, to wit:

52 The United States Circuit Court, Southern District of Ohio, W. D.

THE SWITZERLAND MARINE INSURANCE COMPANY, a Corporation, Pl'f,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY, a Corporation, Defend't. } No. 3230.

Be it remembered that at this term of this court the plaintiff, to maintain the issue joined, offered in evidence the deposition of C. G. Megrue (a copy of which is hereto attached, marked Exhibit A, and made part hereof), and the defendant objected to the reading of so much of said deposition as is in the last half of the following sentence:

"It was what was known as a jewelry trunk, and baggage men are usually able to judge of its contents from its shape and style."

And his objection was overruled and the whole sentence
53 read; to which overruling of said objection counsel for the defendant excepted, and his exception was allowed.

The plaintiff also offered a second deposition of said Megrue (a copy of which is hereto attached, marked Exhibit B, and made part hereof), and counsel for defendant objected to the question and answer, which are in the following words:

"Q. 6. State whether or not, upon these trips, before the loss of the jewelry, the trunk and valise mentioned were received and checked as baggage.

A. They were."

And his objection was overruled; to which overruling said objection counsel for the defendant excepted, and his exception was allowed.

Counsel for defendant also objected to the following question and answer, on the ground that the witness had not shown sufficient knowledge to entitle him to prove a custom, having testified that his whole personal knowledge of the custom of the road prior to this transaction was his travelling over it three or four times,
54 and that the question did not relate to jeweler's trunks:

"Q. State whether or not you know anything touching the custom of the defendant at the time of and before that loss by fire as to the carrying of trunks of travelling salesmen as baggage?

A. It was their custom to check such trunks as ordinary baggage."

The court overruled said objection; to which overruling counsel for defendant excepted, and his exception was allowed.

The plaintiff also read the deposition of Abraham G. Schwab, which is hereto attached, marked Exhibit C, and made part hereof.

The counsel for defendant objected to the last two sentences of the answer to the following question, the court overruled said objection, and the answer was read.

The question and answer are as follows:

"Q. Where and by whom are most or all of these jewelry-sample trunks made, and what similarity is there between them, and
55 are they readily distinguishable from other trunks used by travelling salesmen?

A. Most of them are made by Crouch and Fitzgerald, of New York, and have been for several years; they are generally covered with black leather and bound heavily with iron, and they are generally about the same size, or very near the same size. I should think they are readily distinguishable. If I should see a jewelry trunk I could tell it at once."

To which overruling of said objection counsel for defendant excepted, and his exception was allowed.

The plaintiff also read the following question and answer; to which question and the last sentence of the answer counsel for defendant

excepted, and his exception was allowed and made part of the record:

"Q. Are they readily distinguishable from hardware travelling trunks?

A. I am not quite sure what a hardware trunk looks like. I couldn't tell a hardware trunk if I should see it—that is, for sure. I don't know in what shape trunk hardware men generally carry their samples, but I do know a jewelry trunk."

56 The witness was then asked: "Q. Do you know whether hardware trunks and jewelry trunks are alike or not?"

To which he answered: "A. I don't think they are. I believe a hardware trunk is a trunk generally gotten up on cheaper principle than a jewelry trunk."

The witness was also asked this question: "Q. How familiar are the baggage and train men in the employ of the defendant with sample jewelry trunks, and state how you know that they had any knowledge of them, referring now to the date of December 10th, 1880, and previously?

A. Well, I should think the baggage-master could tell a jewelry trunk at once; most baggage men knew my trunks, and knew there was jewelry in them."

To the reading of which question, and especially to the reading of the first part of the answer, the counsel for defendant objected. He made a special objection to the first sentence of the answer. The court overruled said objections, and the answer was read; to
57 which overruling said objection the counsel for defendant excepted, and his exception was allowed.

The witness was also asked the following question: "Q. Please answer the last part of my question.

A. The jewelry trunks are generally unusually heavy, and the baggage-master who would take hold of them would say: 'Hello, what you got in there, jewelry?' which I couldn't deny if they would ask me that question."

To the reading of which question and part of the answer, beginning "and the baggage-master," etc., the counsel for defendant objected, which objection the court overruled; to which overruling counsel for defendant excepted, and his exception was allowed.

Plaintiff also was asked the following question:

"Q. State whether or not your sample trunks were received and checked as baggage by the defendant company always when you took them with you?

A. I always had them checked as baggage."

58 To which the defendant objected, and his objection was overruled; to which overruling counsel for defendant excepted, and his exception was allowed.

The plaintiff also put in evidence the deposition of one Duff, which is hereto attached, made part hereof, and marked Exhibit E.

Counsel for defendant objected to the reading of the following:

A. I think there were two or three—I am pretty certain—clothing trunks, sample trunks—two or three sample trunks.

But the court overruled said objection and the testimony was read; to which overruling the counsel for defendant excepted, and his exception was allowed.

The witness was further examined as follows:

"What do you mean by a sample trunk?

A. They are extra heavy trunk- that traveling men have to protect their goods and keep them from getting broke- and rough treatment.

54. Are these sample trunks easily distinguished from the ordinary traveling trunks?

A. Yes, sir; I think they are always made a little heavier,
59 and you can tell them unless there are some parties traveling that has made his trunks a little heavier to protect his goods."

Which evidence the counsel for defendant objected to, and his objection was overruled; to which overruling exception was taken and allowed.

The plaintiff also read in evidence the deposition of Griswold, which is hereto attached, marked Exhibit F, and made part hereof. The witness was asked:

"Q. Do commercial travelers or drummers frequently or at all travel over that line of railway?"

To which and the answer thereto the counsel for defendant objected, and the objection was overruled; to which overruling of said objection by the court defendant's counsel excepted, and his exception was allowed.

The witness answered, "Yes."

The counsel for plaintiff also asked the witness if they were frequent customers of the road; to which question and the answer thereto the defendant's counsel objected, and the objection was overruled; to which overruling defendant's counsel excepted, and his exception was allowed.

He answered, "Yes."

60 The counsel for plaintiff also asked:

Q. Do you know the character of the trunks that are usually carried by drummers?

A. Yes; I know the character of them.

To which question and answer the defendant excepted, and his exception was allowed.

He was also asked if he could tell them by the appearance.

He answered, "Yes, sir; by their general appearance."

He was also asked, "Are they constructed differently from ordinary traveling trunks?

A. Yes, sir."

He was then asked, "And by reason of their construction you could generally distinguish the drummers' trunks?

He answered, " Yes, sir; sometimes you could not, but as a general thing you could. They got to charging them for extra baggage, and then they would use the other kind of trunks to get out of paying for the extra baggage and beating the road. As a general thing, those that did not get onto that used the old style."

To each of which last four questions and their several answers counsel for defendant objected, and his objections were overruled; to which overruling said counsel excepted, and his exceptions were allowed.

61 The portions of the deposition of Griswold which relate to finding the express messenger asleep were withdrawn by the plaintiff and not offered in evidence.

Plaintiff also offered in evidence the deposition of one J. S. Maddux, which is hereto attached, marked Exhibit " J," and made part hereof.

It was admitted in the case that the Switzerland Ins. Co. had insured the property in question for Aiken, Lambert & Co., who were the owners thereof when destroyed, in the amount of $5,847.79, and that they had paid the loss to the said Aiken, Lambert & Co., who assigned their claim to the plaintiff, and it was also admitted that the value of the goods destroyed was $4,955.03 over and above the amount of remnants saved.

And the plaintiff having rested in this case, the defendant offered in evidence the deposition of Mike Madden, which is hereto attached, marked Exhibit H.

On cross-examination he was asked:

Q. Have you not been in the habit of carrying on every trip or almost every trip more or less sample trunks?

A. Yes, sir; plenty of them.

62 To which question and answer the counsel for defendant objected, and his objection was overruled. Counsel objected generally and specially because the question did not relate to such trunks as the salesmen handling jewelry generally carried; to which overruling as above counsel for defendant excepted, and his exception was allowed.

Defendant examined one Thomas Cook, and his testimony is hereto attached, marked Exhibit G.

Defendants also offered the deposition of L. B. Garley, which is hereto attached, marked Exhibit I.

The notice attached to the depositions were not read. The certificates of notaries, being regular, were not read in evidence and form no part of this bill of exceptions, and it is agreed by counsel shall not be copied into the record.

This being all the evidence in the case, *and* the counsel for the defendant asked the court to charge the jury that—

" The verdict of the jury must be for the defendants on the ground that there is not sufficient evidence to sustain a verdict for the plaintiff."

Which charge the court overruled; to which overruling counsel for the defendants excepted, and his exceptions were allowed.

63 And the counsel for the defendant also asked the court to charge the jury—

1. If Megrue had no interest in the goods in question at the time they were delivered to the man checking the baggage or at the time of the loss, the plaintiff cannot recover.

Which charge the court refused to give; to which refusal counsel for the defendant excepted, and his exception was allowed.

The counsel for the defendant also asked the court to charge the jury—

"2. If the agent of the railroad company who checked the trunk had no notice at the time it was checked that it contained jewelry and not baggage, then the plaintiff cannot recover."

Which charge the court refused to give as asked, but qualified the same by charging that the defendant in such case would only be liable for gross neglect; to which refusal to give such charge as asked and to the qualifying the same counsel for the defendant excepted, and his exception was allowed.

The counsel for the defendant also asked the court to charge the jury—

64 "3. If the trunk containing the jewelry was fit and proper for the carriage of baggage and such a trunk as baggage was sometimes carried in, and it was shipped as ordinary baggage and no notice was given that it contained anything else, then the plaintiff cannot recover."

Which charge the court refused to give as asked, but qualified the same by adding that the defendants would in such case only be liable for gross negligence; to which refusal to charge as asked the counsel for the defendant excepted, and his exception was allowed.

And the counsel for the defendant asked the court to charge the jury—

"4. If the trunk in question was one fit for the carriage of ordinary baggage, and such a one as travelers sometimes carried their ordinary baggage in, then the fact that the checking agent knew that is was a trunk such as traveling salesmen ordinarily carried their goods in would not entitle the plaintiff to recover if it was delivered by Megrue to the checking agent as ordinary baggage and was so checked by the said agent."

65 Which charge the court refused to give as asked, but gave it by inserting the word "mere" between the words "the" and "fact" in the sentence, "then the 'mere' fact that the checking agent knew," etc.; to which refusal to give the charge as asked and to the giving the same by such insertion counsel for defendant excepted, and his exception was allowed.

The counsel for the defendant also asked the court to charge the jury—

6. If it appear that the trunk in question was checked at the hotel where Megrue was stopping, that it was checked for him as ordinary baggage, and that he represents it as such and gave no notice that any one but himself was interested in it, or of what the

trunk contained, and that there is no evidence whether traveling salesmen sell their own goods or those of other parties, and if he made no contract as to its carriage but such as might be implied from his purchase of a first-class passenger ticket, and paid nothing for its carriage as merchandise, or especially for the carriage of the baggage, and if the said Megrue had no interest in the goods
66 at the time or when they were lost, then the plaintiff cannot recover in this suit.

Which charge the court refused to give; to which refusal to charge as asked the counsel for the defendant excepted, and his exception was allowed.

And the counsel for the defendant asked the court to charge the jury—

7. If the Adams Express Company had an express agent placed upon the car by order of this court, and he occupied one end of the car for his express goods, over which end the baggage-master of the defendant had no control; and if the fire originated in that part of the car and from his fault, and did not originate in the baggage end of the car, over which the said baggage-master had charge, and if the baggage-master, at the time the fire originated, was attending to his duties upon the train, then the fire and loss cannot be attributed to him or the defendants.

Which charge the court refused to give; to which refusal the counsel for the defendant excepted, and his exception was allowed.

67 The counsel for the defendants also asked the court to charge the jury—

"8. The question in this case is not what ordinary traveling salesmen usually do or what style of trunks they usually have or what contracts they usually make with the railroad companies transporting their trunks, but what was the character of the trunk in question and what took place between Megrue and these defendants or their agents, and the burden of proof is upon the plaintiffs to show that the defendants knew what the trunk in question contained, and after such knowledge agreed to carry it without further compensation than was embraced in the ordinary fare paid by Megrue."

Which charge the court refused to give as asked, but gave the same and added thereto that they must have had knowledge or notice that the trunks contained something else than baggage; to which refusal to give such charge as asked the counsel for the defendant excepted, and his exceptions were allowed.

The counsel for the defendants also asked the court to charge the jury—

68 10. "If it appears that the trunk in question was delivered to one of the persons accompanying the baggage wagon at the hotel by one Megrue, who had purchased a passenger ticket for that train, and that he had a valise, which he owned and which did contain his personal baggage; that the trunk in question contained no personal baggage, and that he had no interest therein, but that it was checked with said personal baggage, without any other compensation or consideration than the purchase of said ticket, then,

before the plaintiffs can recover in this action for the loss of said trunk, they must show that the party checking such trunk had authority from the company to bind the company for its carriage from a third person, not a passenger, without other compensation than his ticket, and that he did, with that understanding and having knowledge of the contents and ownership of said trunk, agree to carry and deliver it."

Which charge the court refused to give; to which refusal the counsel for defendants excepted, and his exception was allowed.

69 And the counsel for the defendant asked the court to charge the jury:

11. The defendants, without waiving their foregoing charges, ask the court to charge the jury that the burden is upon the plaintiffs to show that the loss was due to the gross neglect of duty of the baggage-master or of some *or of some* other officer of the defendants on the train, either in causing the fire or in their efforts to save the baggage during the fire.

To which the court refused to give as asked, but qualified the same by the general charge; to which refusal the counsel for the defendants excepted, and his exception was allowed.

The counsel for the defendant also asked the court to charge the jury:

12. That gross fault or neglect is the want of all the least care, and involves the idea of some recklessness or gross disregard of duty.

Which charge the court refused to give; to which refusal the counsel for the defendants excepted, and his exception was allowed.

And the counsel for defendants asked the court to charge the jury:

70 13. If the person checking the trunk of Megrue was an employee of the omnibus company and was sent with their baggage wagon to collect baggage of passengers and check it at the hotel, and was for that purpose entrusted with checks by the railroad company, then, unless there is some proof that he also had authority to check merchandise as baggage free of extra charge or to bind these defendants by a contract to carry such, these plaintiffs cannot recover in this action.

Which charge the court refused to give; to which refusal counsel for defendant excepted, and his exception was allowed.

And the counsel for the defendant asked the court to charge the jury:

14. The verdict of the jury must be for the defendants on the ground that there is not sufficient evidence to sustain a verdict for the plaintiffs.

Which charge the court refused to give; to which refusal defendant's counsel excepted, and his exception was allowed.

71 And the court gave the following general charge, and at the end thereof submitted to the jury five questions for them to answer; which charge and questions are in the words and figures following:

Charge to Jury.

SAGE, *J.*:

GENTLEMEN OF THE JURY: This action is brought to recover the value of the contents of a sample trunk which was destroyed by fire in a baggage car of defendant's passenger train, while in course of transportation from Cincinnati to Louisville, on the tenth day of December, 1880.

It is alleged by the plaintiff and admitted by the defendant that on that date C. G. Megrue, a travelling agent for the firm of Aiken, Lambert & Co., of the city of New York, became a passenger on one of the trains of defendant at Cincinnati, O., bound for Louis-
72 ville, in the State of Kentucky; that defendant was at that date a common carrier of passengers, baggage, and merchandize; that said Megrue had purchased a first-class ticket from Cincinnati to Louisville, entitling him to ride upon said trains and to have the just amount of baggage incident to his trip as such passenger.

Plaintiff also alleges that just previous to boarding said train said Magrue delivered to the defendant as such common carrier a trunk containing, "among other baggage," a large and valuable collection of watches and jewelry, particularly described in exhibits attached to and made part of the petition, and which were used as samples in his trade and the property of Aiken, Lambert & Co., contained in what is known and recognized as a sample trunk, and that the defendant took the same into its possession and checked it as the baggage of said Megrue and agreed to carry it safely to Louisville, and there deliver it to him within a reasonable time.

Plaintiff further alleges that the defendant, disregarding
73 its duty in that regard, never delivered said trunk or its contents or any part thereof in accordance with its said contract, but, on the contrary, that said baggage car and its contents were, on the 11th of December, 1880, destroyed by fire, which occurred through the negligent piling of combustible substances around the stove in said car and in the negligent keeping of said fire in said stove by the defendant and through the neglect of efforts to extinguish said fire.

The defendant admits that Megrue just previous to boarding the train shipped a trunk, but not a large one, as baggage, but defendant says that its agents had no knowledge of the contents of the trunk, and that they supposed that said trunk contained the personal baggage or effects of said Megrue, but defendant denies that it had knowledge that said trunk was one of such trunks as are used for samples in the jewelry trade.

The defendant also admits that the trunk so shipped and supposed by its agents to contain baggage was received from Megrue
74 and checked as his baggage, and that the defendant undertook to carry the same, supposing it to be baggage, to Louisville; also the burning of the baggage car and the damage by fire thereby to said trunk and contents, but defendant denies their total destruction, and denies the allegations of negligence made by plaintiff.

The plaintiff alleges that the value of said goods so consumed was $5,977.43, and that the plaintiff was engaged in the business of fire and marine insurance, and, by a policy in force at the time of the loss, had insured the said Aiken, Lambert & Co. against loss by fire to said goods, and upon proof of loss paid to said firm the sum of $5,847.79 as the amount of said loss; also that according to the terms of said policy they were, upon such payment, subrogated to all plaintiff's claims against the defendant, and that said claim has been assigned to them by said Aiken, Lambert & Co.; wherefore plaintiff prays judgment against the defendant for $5,847.79, with interest from January 1, 1881.

All these allegations are denied by the defendant.

75 The allegations of the petition not controverted by the answer are, for the purposes of the trial, to be taken as true, and therefore to be so considered by you. They are not in issue and require no evidence to support them.

If you find from the evidence that the contents of the lost trunk were the property of Aiken, Lambert & Co.; that the plaintiff had insured them against the loss of the same by fire, and that after the loss plaintiffs paid the insurance and took an assignment of Aiken, Lambert & Co.'s claim against the defendant, I charge you that plaintiff, to the extent of the sum paid under the policy, succeeded to whatever rights Aiken, Lambert & Co. had, by reason of the loss, against the defendant.

When a railroad company issues a passenger ticket it thereby contracts not only to carry the passenger to the station named in the ticket, but also to transport his baggage. By "baggage" you are to understand such articles of personal convenience or necessity as are

76 usually carried by passengers for their personal use, as wearing apparel, a woman's jewelry, money for travelling expenses and personal use to an amount not exceeding what a prudent and reasonable person would deem proper and necessary for that purpose, &c.

I need not specify more particularly; but baggage does not include articles of merchandize intended for sale or for use as samples and not designed for the use of the passenger, and if the passenger has such articles checked and received by the carrier as baggage the carrier will not be liable for them if lost or injured, unless, having been informed of their true character or knowing or being presumed to know from the circumstances that, though being carried by the passenger as baggage, they consist of merchandize, he accepts them for carriage or unless there be an established custom or usage on the part of the carrier to carry merchandize or samples belonging to passengers and packed in trunks or valises or bundles as baggage, and unless, also, the property is destroyed by reason of such negli-

77 gence on the part of the carrier as I shall refer to in the further progress of the charge. In this case it is admitted that the lost trunk contained only watches, jewelry, and gold pens. These articles were not baggage, and the defendant is not liable for their loss until it is established, by a preponderance of the evidence in this case, that defendant received and checked the trunk having been

informed what its contents were or, second, knew or is presumed to have known from the circumstances that the contents of the trunk were merchandize or, third, that it was the established custom or usage of the defendant to receive and transport as baggage trunks containing merchandize or unless the trunk was lost by the gross negligence of the defendant, as hereafter defined.

I will explain what I mean by presumption from circumstances. If the trunk was such a trunk as was used only for carrying samples of jewelry and not for travellers' personal baggage, and the testimony satisfies you that the agent or agents of the company who re-
78 ceived and checked it knew, from its construction or appearance, or would have known if they had looked at it, that it was a jewelry trunk, used only for carrying samples of jewelry and not for baggage, then it is a fair presumption that the company waived objections and received and undertook to carry the trunk and its contents as baggage. I say that the company waived, because the authority of the agent to check the trunk and represent the company is admitted by the answer. The plea is that their agents received the trunk and checked it without knowledge of its contents and supposing that it contained the personal baggage or effects of Megrue, and the defendant denies that it had knowledge that the trunk was one of such trunks as were used for samples in the jewelry trade.

If you find from the testimony that such trunks were in use also by travellers for the carriage of baggage only it will be your duty to consider whether such use was, if not general, at least to such an extent as would naturally lead the agent of the company to suppose that this trunk contained baggage. If the use of such trunks
79 by travellers for ordinary baggage was only exceptional the presumption that it was a sample trunk and that it contained jewelry and not baggage would not be much affected, if at all, otherwise, if they were frequently in use for the carriage of baggage. The question is, after all, whether the trunk itself, by its appearance, would naturally suggest to the agent that it contained samples or jewelry. If you find from the testimony, under the instructions already given, that the trunk and contents were offered to the defendant and received and checked by the defendant as baggage and not as jewelry, the defendant supposing and having a right to suppose that the trunk contained baggage only, and the custom or usage already referred to is not established by testimony, the defendant is not liable for its loss unless the defendant was guilty of gross negligence. I use the expression "gross negligence" for convenience, but will explain what is meant by it. If the trunk was imposed upon the company and received by it as a trunk containing only personal
80 baggage, as above stated, Megrue was guilty of a fraud upon the company, and the company was under no obligation with regard to it excepting that, having received the trunk without, so far as the evidence shows, question or objection, it was not at liberty to neglect any and all care of it and suffer it to be lost or destroyed by carelessness or reckless inattention, but the company would not be bound in that case to exercise ordinary care—that is, such care

as a prudent man is accustomed to exercise in his own affairs. For illustration in that case and as to that trunk, the company was under no obligation to Megrue or to Aiken, Lambert & Co. to keep a baggage-master or other employé in the baggage car to guard against the possible, but not the probable, damage from fire originating either in the baggage compartment or in any other compartment of the baggage car or in the express or in the mail car. When the fire broke out it was the right of the company in that case to
81 save, first, if necessary, the baggage, in respect to which it was an insurer; but, on the other hand, the defendant would not be excused if by its employés it left the car unattended when damage from fire was apparent, nor if, when the fire was under way, it left this trunk without making any effort to save it.

The duty of the company to the passengers was to have the train fully manned so that the trainmen and the baggage-master and the engineer and fireman could be at their respective posts of duty at all times, excepting, of course, when an extraordinary emergency, as the burning of a car, might occur; but this rule would not apply in favor of one who had fraudulently induced the company to take merchandize as baggage under the circumstances stated above. He must prove, upon a claim for loss, the kind and degree of negligence referred to in explaining what is meant by gross negligence.

I have referred to custom or usage as affecting the liability of the defendant. The burden of proving that it was the custom of
82 the defendant to carry as baggage and not as freight sample trunks containing merchandize is upon the plaintiff, and the evidence should establish that the custom included the carriage, as baggage, of jewelry-sample trunks, for the defendant might well say "we will carry samples of clothing or of notions, but we will not carry as baggage the more expensive merchandize—jewelry." The reason why, if the custom be proven, it affects the liability of the defendant is this: The rule making it the duty of the carrier to transport with the passenger only his personal baggage is for the protection of the carrier. If, therefore, the carrier cho-ses to waive that limitation and to accept and treat as baggage samples of merchandize it may do so, and if it do so it is liable for the samples as if they were baggage, and this waiver may be evidenced, not only by proof of waiver in the particular case, but by proof that the carrier has by its custom or usage established that waiver as a general waiver applicable to the general travelling public or to a par-
83 ticular class of travellers, as drummers—that is, men whose business it is to solicit custom and who generally sell by sample; but the evidence must be such as to satisfy you that there was such a custom or usage recognized and practiced by the defendant.

It is not sufficient to prove that the defendant sometimes did so. Evidence of particular instances is not necessarily evidence of custom, although it may tend to prove custom. It must appear from the evidence that it was the habit—the general practice—of the defendant to receive and transport as baggage trunks containing merchandize, knowing them to be such, and not charging for them

as freight, excepting for extra weight, but I think and so charge you that if the evidence establishes to your satisfaction that the defendant was in the habit of receiving, and it was its custom to receive and check, trunks containing merchandize and transport them in its baggage cars it devolves upon the defendant to prove that it received extra compensation therefor, because that is a fact
84 peculiarly within the knowledge of the defendant.

I think proof of the fact that a railway carrier habitually receives and checks and transports in its baggage cars trunks known by it to contain merchandize makes out a *prima facie* proof of custom, and that if the carrier relies upon the fact that it in fact carries them as freight for hire it must establish that fact by evidence.

It appears from the evidence, and about this there is no controversy, that the contents of the lost trunk were the property of Aiken, Lambert & Co., whose travelling salesman Megrue was.

It is also in evidence, and the fact is not in dispute, that the plaintiff paid Aiken, Lambert & Co. $5,847.79 insurance on account of the loss. It follows that the plaintiff is rightly the plaintiff in this action, subject to all the defenses which might have been made to an action by Megrue had be been the owner of the contents of the lost trunk and had brought suit. It is not material that the jewelry and other contents of the trunk were not the property of Megrue,
85 but were the property of his principals or employés.

The plaintiff, if you find in favor of the plaintiff, is entitled to recover the value of the contents of the lost trunk to the extent of the insurance paid to Aiken, Lambert & Co., less the salvage, which was $892.16—that is (if you find the value as claimed in the amended petition), the amount of insurance paid, which was $5,847.49, less $892.16, being $4,955.03.

If you find that the trunk was received and checked under the custom, as alleged, as baggage; or, without respect to the custom, that the defendant, knowing or, under the circumstances, presumed to know, that it contained merchandize, received it and checked it and carried it as baggage, you will add interest to the amount found from January 1, 1881, to February 3, 1885, the first day of this term.

If you find that the defendant received the trunk as baggage, believing that it contained personal baggage only, and you find
86 against the alleged custom, and nevertheless find that the trunk was lost by the gross negligence of the defendant, as explained above, your verdict will be for the plaintiff for the amount of the loss, and you will be at liberty to add interest as above, but you are not bound to do so.

If you find for the defendant your verdict will be a general one for the defendant. Your findings must be based exclusively upon the evidence and under the instructions given you in this charge.

Some appeals have been made to you against your possible prejudice. It is not necessary, gentlemen, to remind you that you are under the obligation of a solemn oath to try this case and a true verdict render according to the law and the evidence, and I need not say that the duty of court and jury to deal fairly, justly, and impartially with the parties in the case is of infinitely greater impor-

tance than the success of either litigant, for the surest safeguard of the nation and of its citizens is the due administration of
87 law. Without that everything is at risk.

It is not the custom in this court to send the depositions with the jury to the jury-room, but if the jury wish they can call for them and they will be sent.

There are some special charges asked for, which I will read, although they are covered by the general charge. The first is—

"That before the defendant can be bound by any custom of receiving merchandize as baggage, the plaintiff must fully satisfy the jury by a preponderance of testimony that such custom was known to the defendant and their contract was made with reference thereto, and it must also be proved that such custom was the general, uniform, and notorious practice of this defendant.

"That a custom or usage affecting a large trade that extends throughout the country and very many persons cannot be proved by one or two witnesses testifying to their own practice simply. The custom must be that of this defendant." It must be the gen-
88 eral custom, not applying to one or two persons, but applying either to this class of travellers known as drummers, or, in other words, as commercial travellers—the old designation—or applying to the general public. It is enough if it applies to drummers. It is not necessary that the custom should be proven to apply to anybody else.

"If the agent of the railroad company who checked the trunk had no notice at the time it was checked that it contained jewelry and not baggage, then the plaintiff cannot recover."

That I will not give in that precise form. I say that if he had no notice, and by notice is not meant spoken notice necessarily—it is not limited to that—if he had no notice, either by word of mouth or by the appearance of the trunk, that this was jewelry and not baggage, and if there was no such custom as has been alleged, then the plaintiff cannot recover, excepting upon proof of gross negligence such as I have stated. As I have said, if the defendant takes this property without inquiry and checks it, although it may not
89 be liable as an insurer by reason of the fact that it contains merchandize and not baggage, still there is a measure of liability, and that measure is to be fixed by ascertaining whether the company has been guilty of gross negligence, as I have said in the general charge.

"If the trunk containing the jewelry was fit and proper for the carriage of baggage and such a trunk as baggage was sometimes carried in, and it was shipped as ordinary baggage and no notice was given that it contained anything else, then the plaintiff cannot recover." That depends upon the qualifications which I have already stated.

If the custom existed it makes no difference what the appearance of the trunk was. If it was packed in an ordinary trunk, without any indication that it was a sample trunk, and it was the custom to carry for drummers or for the public sample trunks containing merchandize, then the company is liable for it as it would be for

baggage, because the obligation to indicate in any way that
90 it was jewelry or merchandize was no longer resting upon the passenger. The company had established by its practice the custom, and the appearance of the trunk didn't make any difference. These trunks were all carried in one car and all received the same care, and the company was under precisely the same degree of liability, in case the custom existed, whether the trunk contained merely clothing or whether it contained also merchandize.

Mr. LINCOLN: That depends upon the custom, however.

The COURT: Of course. "If the trunk in question was one fit for the carriage of ordinary baggage, such an one as travellers sometimes carry their ordinary baggage in, then the mere fact the checking agent knew it was a trunk such as travelling salesmen ordinarily carry their goods in would not entitle the plaintiff to recover, if it was delivered by Megrue to the checking agent as ordinary baggage and was so checked by the said agent."

91 That is subject to the instructions I have already given you with reference to the custom and with reference to the knowledge of the company to be derived from the inspection of the agent as to the character of the baggage from its appearance, and also subject to the instructions I have given you regarding negligence. Those always apply.

"If the trunk contained nothing but watches, gold pencils, and jewelry carried for sale, and not wearing apparel, or such things as were carried for the personal comfort of Megrue on his journey, then it was not embraced within his ticket, and the purchase of the ticket imposed no liability to carry it upon the defendant."

I will submit to you five questions, asking you to answer them in writing, putting the answer under each question:

First. "What was the value of the contents of the trunk after deducting salvage?" Now, I may fairly say to you, gentlemen, that the evidence, if you believe it, discloses that the value of the trunk was, as stated in the petition, fifty-nine hundred and odd dol-
92 lars and the amount of the salvage is disclosed in the deposition of one of the witnesses; the amount of insurance paid was fifty-eight hundred and something. I think I may say to the jury that they would be justified in finding the value as stated.

Second. "Did the checking agent have notice when he checked the trunk that it contained jewelry or property other than the personal baggage of Megrue; if yea, was that notice conveyed by the appearance of the trunk or was it by any statement made to such agent? State which." Touching the second branch of this question, I cannot remember that there is a syllable of testimony in the case directly that anybody said anything to the agent who checked the trunk, but it is for you to determine that.

Third. "At the time of the checking of said trunk and prior thereto, was it the custom of the defendant—I use the word 'custom' as defined in the charge—to carry as baggage and without extra charge, except on account of extra weight, drummers' trunks containing merchandize, knowing that they were drummers'
93 trunks and that they contained merchandize?" As I have

instructed you in the general charge, if you find from the evidence that it was the custom to carry these trunks in the baggage car for passengers, the presumption is that they were carried without extra charge, because it devolves upon the defendant to prove that extra compensation was paid if it was paid.

Fourth. "Was the loss of said trunk occasioned by the gross negligence of said defendant?" I use the term "gross negligence" there to express the kind of negligence that I have defined in the general charge.

Mr. LINCOLN: There is one thing with reference to the verdict. If they find a general verdict for the plaintiff the amount would not necessarily be the sum which they consider the value of the trunk, because they would necessarily have to add interest in the one case and in the other would have the right to do it.

COURT: The reason why the amount of the insurance paid limits the amount of the recovery is this—that is, if the plaintiff is
94 entitled to recover at all: The insurer is subrogated by the law to the claim of the assured or he takes an assignment of his claim as an indemnity, and therefore all that he can make out of it—all that he is entitled to recover—is enough to make him whole; and therefore if the plaintiff is entitled to recover at all it is entitled to recover only up to the amount of the insurance that it has paid. If the value of the property is less than that, of course the plaintiff only recovers the amount of the insurance.

Mr. LINCOLN: But he may recover the value of the property and interest upon it.

COURT: In case the property was knowingly received and transported as baggage he is entitled, as matter of law, to interest; in case it was imposed upon the company by fraud, as I have indicated, and lost by such negligence as I have defined, then they are entitled to recover the value up to the amount of the insurance, and you may give interest. I understand there is no objection to that.

95 Mr. LINCOLN: If there is any recovery at all.

The following special charges asked for by the defendants were refused:

First. If Megrue had no interest in the goods in question at the time they were delivered to the man checking the baggage or at the time of the loss, the plaintiff cannot recover.

Second. If the agent of the railroad company who checked the trunk had no notice at the time it was checked that it contained jewelry and not baggage, then the plaintiff cannot recover.

Third. If it appear that the trunk in question was checked at the hotel where Megrue was stopping, that it was checked for him as ordinary baggage, and that he represented it as such and gave no notice that any one else but himself was interested in it or of what the trunk contained, and if there is no evidence whether traveling
96 salesmen sell their own goods or those of other parties, and if he made no contract for its carriage but such as might be implied from his purchase of a first-class passenger's ticket, and

paid nothing for its carriage as merchandize, or especially for the carriage of the baggage, and if the said Megrue had no interest in the goods at the time or when they were lost, then the plaintiff cannot recover in this suit.

Fourth. If the Adams Express Company had an express agent placed upon the car by order of the court and he occupied one end of the car for his express goods, over which end the baggage-master of the defendants had no control, and if the fire originated in that part of the car and from his fault, and did not originate in the baggage end of the car, over which the said baggage-master had charge; and if he, at the time the fire originated, was attending to his duties upon the train, then the fire loss cannot be attributed to him or the defendants.

Fifth. The question in this case is not what ordinary travelling salesmen usually do or what style of trunks they usually
97 have or what contracts they usually make with the railroad companies transporting their trunks, but what was the character of the trunk in question and what took place between Megrue and these defendants or their agents, and the burden of proof is upon the plaintiffs to show that the defendants knew what the trunk in question contained, and after such knowledge agreed to carry it without further compensation than was embraced in the ordinary fare paid by Megrue.

Sixth. If it appears that the trunk in question was deliverd to one of the persons accompanying the baggage wagon at the hotel by one Megrue, who had purchased a passenger ticket for that train, and that he had a valise which he owned and which did contain his personal baggage; that the trunk in question contained no personal baggage, and that he had no interest therein, but that it was checked with said personal baggage without any other compensation or consideration than the purchase of said ticket, then, before the plaintiffs can recover in this action for the loss of said trunk, they
98 must show that the party checking such trunk had authority from the company to bind the company for its carriage for a third person—not a passenger—without other compensation than his ticket, and that he did it with that understanding and, having knowledge of the contents and ownership of said trunks, agree- to carry and deliver it.

99 And counsel for defendants excepted to the following part thereof: "Unless having been informed of their true character or knowing or being presumed to know from the circumstances that, though being carried by the passenger as baggage, they consist of merchandise he accepts them for carriage, or unless there be an established custom or usage on the part of the carried to carry merchandise of samples belonging to passenger and packed in trunks or valises or bundles as baggage, and unless, also, the property is destroyed by reason of such negligence on the part of the carried as I shall refer to in the further progess of the charge."

And his exception was allowed.

And the counsel for defendants also excepted to so much of the said charge as is in these words:

"Or is presumed to have known from the circumstances that the contents of the trunk were merchandise; or, third, that it was the established custom or usage of the defendant to receive and
100, transport as baggage trunks containing merchandise, or unless the trunk was lost by the negligence of the defendant, as hereafter defined."

And his exception was allowed.

Counsel for defendant also excepted to such as relates to the presumption as to a traveler's trunk, and his exception was allowed.

Also that part thereof relating to gross negligence.

Also excepted to the following:

"But I think and so charge you that if the evidence establishes to your satisfaction that the defendant was in the habit of receiving, and it was its custom to receive and check, trunks containing merchandise and transport them in its baggage cars it devolves upon the defendant to prove that it received extra compensation therefor, because that is a fact peculiarly within the knowledge of the defendant."

Also to so much thereof as is in the following words:

"I think proof of the fact that a railway carrier habitually receives and checks and transports in its baggage cars trunks
101 known by it to contain merchandise makes out a *prima facie* proof of custom, and that if the carrier relies upon the fact that it in fact carries them as freight for hire it must establish that fact by evidence."

And his exceptions were allowed.

Counsel also excepted to the following:

"It is not material that the jewelry and other contents of the trunk were not the property of Megrue, but were the property of his principals or employers."

And his exception was allowed.

And the counsel for defendants also excepted to so much as related to the liability of the defendant in carrying drummers' trunks in the general charge, and his exceptions were allowed.

And the counsel for defendants also excepted to the charge given by the court in relation to proof of the custom to carry baggage without charge, and that it was enough to find that they were accustomed to carry merchandise as baggage, and as to the presumption that they were to carry without, and as to its being the duty
102 of the company that extra compensation was paid, and exceptions were allowed.

And the jury having found a verdict for the plaintiff, the defendants moved the court to set aside the same, and especially to set aside the finding No. 4, as to gross neglect, and the court did overrule the motion to set aside the verdict, but did grant the same as to the said finding of gross neglect and set the same aside.

In testimony whereof the judge trying said cause hereunto sets his hand and seal and orders this bill of exceptions to be made part of the record.

GEORGE R. SAGE, [SEAL.]
U. S. District Judge Southern District of Ohio, Sitting as Circuit Judge.

103 THE SWITZERLAND MARINE INSURANCE COMPANY, a Corporation, Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON R. R. COMPANY, a Corporation, Defendant.
} Case No. 3230.

Pending in the circuit court of the United States, S. D. O.

The above-named defendant will take notice that on Wednesday, the 1st day of March, A. D. 1882, the plaintiff above named will take the depositions of C. G. Megrue, Jr., to be used as evidence in the trial of the above cause, at the office of Ramsey, Matthews & Matthews, northeast corner of 4th and Vine streets, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

RAMSEY, MATTHEWS & MATTHEWS,
LONCOLN, STEPHENS & SLATTY,
Attorneys for Plaintiff.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

Done this — day of ——, 18—.

[Endorsed.]

We accept notice, but prefer thereby very much of it can be arranged.

CHAS. H. STEPHENS.

104 EXHIBIT A.

Depositions of sundry witnesses taken before me, W. H. Miner, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notice, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff, in which The Switzerland Marine Insurance Company is plaintiff and The Louisville, Cincinnati and Lexington Railroad Company is defendant. C. B. Matthews, Esq., being present on behalf of the plaintiff, and John A. Slattery on behalf of defendant.

C. G. MEGRUE, Jr., of lawful age, being by me first duly cautioned and solemnly sworn, deposes and says as follows:

Direct examination by Mr. MATTHEWS:

Int. 1. State your name, age, residence, and occupation.

Ans. C. G. Megrue, Jr.; aged 27 years; residence, New York city; occupation, travelling salesman.

Int. 2. Please state how you were engaged on and before the 10th day of December, 1880, and please state also with what house and in what capacity.

105 Ans. I was a travelling salesman for Aiken, Lambert & Co., of New York city, on and about that date.

Int. 3. Please state what business that firm was engaged in on that date.

Ans. Wholesale jewelry and gold pens.

Int. 4. Please state where you were on the 10th day of December, A. D. 1880, and what you had with you.

Ans. I was in Cincinnati, Ohio, on the 10th day of December, 1880; I had a trunk of jewelry with me.

Int. 5. Please state when you left Cincinnati, after being there on the 10th of December, 1880, and by what means did you leave.

Ans. I left Cincinnati for Louisville, Kentucky, on the evening train, on the Louisville, Cincinnati and Lexington railroad.

Int. 6. Please state whether or not you had purchased a ticket on that train over that road; and, if so, to what point, and what kind of a train was it—passenger or freight.

Ans. I purchased a ticket at the railroad office from Cincinnati to Louisville, and went on a passenger train; it was a

106 first-class passenger ticket.

Int. 7. Please describe fully the build and external appearance of the trunk you speak of; state whether you had more than one with you, and whether or not there is any specific kind of trunk devoted to the carrying of jewelry, and whether there are any peculiarities about them that indicate the purposes for which they are used and by which they may be distinguished from other trunks.

Ans. I had but one trunk with me—a medium-sized, leather-covered, and iron-bound trunk, such as used by jewelry travellers; there is a specific kind of trunks for jewelry travellers, such as I have described; they may be distinguished from other trunks by the style of their build.

Int. 8. When you left Cincinnati, on the 10 December, 1880, for Louisville, what did you do with that trunk?

Ans. I checked it over the Louisville, Cincinnati and Lexington railroad, giving it in charge of their baggage-master.

Int. 9. State what was done with it after it was checked.

Ans. It was put in the baggage car.

107 Obj.—Question and answer objected to.

Int. 10. Look at the brass checks handed to you and say what they are. State whether or not you received a check or checks from the railroad company's baggage agent when you delivered him the trunk; and, if so, state whether or not the checks presented you now are the same that were handed you by said baggage agent.

Ans. I received two checks from the railroad company, one calling for the trunk and one for a satchel, which I turned over to the agent of the Switzerland Marine Insurance Company. I cannot identify these as the checks I received on that occasion, not having

a memorandum of their numbers at the time I turned them over to the insurance agent.

Int. 11. State whether or not this satchel had any jewelry in it and whether or not the satchel and trunk arrived in Louisville; if not, what became of them?

Ans. The satchel had the amount of gold pens in it as is stated in the bill against the insurance company; neither the trunk nor
108 satchel arrived in Louisville, both being burned in the baggage car.

Obj.

Int. 12. Where did this happen; in what part of the train were you when it occurred? And state fully all you saw and know about the burning; state what time of the day or night it was.

Ans. The trunk, satchel, and baggage car burned near La Grange, Kentucky, at or near 12 o'clock on the 10th of December. I was in one of the rear passenger coaches, and when the train was stopped on account of the burning of the baggage car I went forward and met the baggage-master and told him of my trunk and its contents; the baggage car was side-tracked near the place of burning. I remained until morning and gathered up what I could of the melted contents of the trunk, and turned the same over to the railroad company.

Int. 13. State how much of the baggage car was consumed, and whether any, and, if so, what, efforts were made to extinguish the fire or get out the baggage, so far as you observed. The en-
109 tire wood-work of the car was burned; a small effort was made to extinguish the fire and get out the baggage.

Int. 14. Whose property was the jewelry in the trunk and satchel you speak of?

Ans. The trunk and jewelry and gold pens in the satchel belonged to Aiken, Lambert & Co.; the satchel was my own.

Int. 15. Please state what quantity of jewelry was in the trunk when it was burned. Give the different kinds and their values.

Obj.—Question objected to.

—. There were $5,847.79 of jewelry in the trunk and satchel, including watches, jewelry, and gold pens; including plated and gold jewelry. I cannot enumerate the different articles or their prices without referring to bills.

Int. 16. Please state how the business between yourself and the house of Aiken, Lambert & Co. was done with reference to keeping the accounts with you.

Ans. The stock I start with is charged against my trunk at cost of the goods. All goods shipped to me while I am on the road are charged in the same way. For each package received while on the road we receipted to the house. Any goods returned by me
110 while on my trip is credited to my stock. We furnish the house with an itemized account of all goods sold on day of sales. The sales are credited to my account at selling price. The

profits of sales made by me are figured by the book-keeper of the house, with which I have nothing to do.

Int. 17. When you started on that trip what knowledge had you that the goods with which you were charged or which were charged to your trunk actually went into the trunk and were brought away by you?

Ans. I charged the goods myself, and also packed them in the trunk.

Int. 18. What knowledge have you that the goods charged to your trunk as sent to you while on that trip were actually received by you and placed in this trunk?

Ans. I was furnished bills for goods shipped to me, and I checked the same off to see if the bills were correct. When making out the bill against the insurance company, after the burning of the trunk,
I went over bills of goods shipped to me and found them cor-
111 rect—that is, I found the accounts as charged on the books to me correct.

Int. 19. What knowledge have you that the sales actually made by you on this trip are correctly credited to you or your trunk on the books of Aiken, Lambert & Co.?

Ans. The sales made by me on this trip are upon manifolds, numbered, and if any — found missing we are notified by the clerks, and we make duplicates of the same. After the burning of the trunk I checked all sales made by me on this trip with the manifolds kept at the office of this firm, and found the same were credited to me.

Int. 20. What, if anything, had you to do with the preparation of Exhibits A, B, C, and D attached to the deposition of James C. Aiken, taken in this cause on the 31st of October, 1881?

Ans. I assisted in making them out.

Int. 21. State what each shows, and whether or not it is correct.

Ans. Exhibit A shows original cost of the contents of the trunk and subsequent shipments to me. Exhibit B shows cost of jewelry
sold from trunk by me. Exhibit C shows original cost of
112 watches in the trunk and subsequent shipments to me. Exhibit D shows the cost of watches sold from the trunk by me. They are all correct.

Int. 22. State whether or not the aggregate of these papers show in detail the articles in your trunk and valise at the time of the fire, and their cost.

Ans. They do.

Int. 23. How do the prices in these statements compare with what would be known as the market prices of these goods in New York, Cincinnati, and Louisville, respectively?

Ans. The prices are what the goods actually cost. They would be the same as the market prices at the points named.

Int. 24. Do you sell at cost prices in the market?

Ans. We do not.

Int. 25. To what class of people do you sell?

Ans. To what is known as the retail trade—to members of the retail trade.

Int. 26. Was the market price at that time in Louisville as low as the cost price in New York?

Ans. The manufacturers' market price would be as low.
113 The jobbers would add a margin to the manufacturers' prices—a margin of about 25%.

Int. 27. State whether or not Aiken, Lambert & Co. are manufacturers or jobbers or both, and whether there are any manufacturers of your line of goods west of New York.

Ans. They are both jobbers and manufacturers. There may be some houses west of New York that manufacture goods similar to goods manufactured by Aiken, Lambert & Co. They make some specialties, but do not manufacture the line of goods that we do.

Int. 28. Do you know, personally, anything in regard to the cause of the fire spoken of above?

Ans. I do not.

Int. 29. Do you know whether the baggage man had any knowledge as to the contents of the trunk, and what there was, aside from its appearance to indicate to him what its contents were?

Ans. I do not know that he had any knowledge as to the contents of the trunk.

Objected to and ruled out.

I travel a good deal with such trunks, and baggage men
114 usually know their contents by their weight and the style of the trunk, being heavier than ordinary sample trunks.

Question and answer ruled out, & exception by pl'f.

Cross-examination by Mr. SLATTERY:

Int. 1. When did you start out on the trip with that trunk, and when was the trunk packed, and where was it packed?

Ans. I think it was on August 2nd, 1880, that I started on this trip. The trunk was packed in Aiken, Lambert & Co.'s store, in New York city, during the week previous to my starting out.

Int. 2. Had you at any time previous to the 10th of December, 1880, taken an invoice of the contents of the trunk; and, if yes, when?

Ans. I had not.

Int. 3. Was the coach in which you left Cincinnati, on the train of the 10th of December, a sleeping coach?

Ans. It was not.

Int. 4. How was your attention called to the burning of the car?

Ans. By the stopping of the train.

115 Int. 5. Did you get out to see what had caused the train to stop?

Ans. I did.

Int. 6. What progress had the fire made at the time when you first saw it?

Ans. The entire car seemed to be in flames.

Int. 7. What means had you of knowing whether or not any effort had been made to extinguish the fire and recover any of the baggage?

Ans. I saw them try to extinguish the fire by taking water from an engine near by.

Int. 8. The entire car being in flames, do you think the baggage could have been removed therefrom?

Ans. The baggage could not be gotten out.

Int. 9. Were the trunk and satchel checked on the train or in a baggage-room in the depot?

Ans. They were checked from the hotel by the company's agent.

Int. 10. From what hotel?

Ans. The Burnet House.

Int. 11. Were the trunk and satchel checked as ordinary baggage?

Ans. They were.

Int. 12. Was there anything in the appearance of that
116 trunk to indicate its use and contents to any one not a travelling agent for a jewelry house or otherwise connected with the jewelry trade?

Ans. It was what is known as a jewelry trunk, and baggage men are usually able to judge of the contents from its shape and style.

Objected to. Rule.

Int. 13. How do you know that baggage men are usually able to judge of its contents from its shape and style?

Ans. I have frequently had baggage men tell me the contents of my trunk, not knowing what line of goods I was travelling for.

Int. 14. When preparing to start on the trip spoken of were the several articles contained in the trunks selected by you from the stock of Aiken, Lambert & Co.; were the bills of the same made out by you and checked with the books of that firm, and were all the articles placed in the trunk by you?

Ans. I selected the goods; charged them with the aid of an assistant. The book-keeper does the checking. The goods were packed by myself.

Int. 15. How soon after the burning of the trunk did you
117 report that fact to Aiken, Lambert & Co., and what was the substance of your report?

Ans. On the morning after the burning of the trunk. It was reported by a telegram stating the trunk had been destroyed by fire, and that the contents were a total loss, or something to that effect.

Int. 16. Did you or not communicate with the company by letter concerning such loss?

Ans. I did.

Int. 17. What did you do after the loss of the trunk?

Ans. I went to Louisville and waited mailed advice for me from Aiken, Lambert & Co.

Int. 18. What advice did the firm give you?

Ans. Get affidavits of the employés of the train and return to New York.

Int. 19. Upon your return to New York did you compare, with the aid of anybody, the reports of sales made by you while on your trip and the invoices of goods received by you from the firm with the

corresponding credits and charges on the books of Aiken, Lambert & Co.?

Ans. With the aid of a clerk I checked off both invoices of goods sold and received by me; further than that I had nothing to do with Aiken, Lambert & Co.'s books.

118 Int. 20. Are not the goods taken out by their salesmen charged against such salesmen on the books of Aiken, Lambert & Co., and are not the reports of sales made by the respective salesmen credited upon the books of said firm?

Ans. I do not know how the entries are made upon the books of Aiken, Lambert & Co.

Int. 21. In making up the proofs of loss for the insurance company were the articles said to be in the trunk at the time of its destruction ascertained from the books of the firm or not?

Ans. They were made up from books known as my stock books and not from the books of the firm. These stock books are the books of Aiken, Lambert & Co., and when I say I do not know what entries were made on the books of Aiken, Lambert & Co. I mean their general books.

Int. 22. Do you keep the original of the manifold invoices made of your sales, or, rather, your report of sales?

Ans. We do.

Int. 23. Where were such originals at the time of the destruction of the trunks?

119 Ans. Those that I had were in the satchel and were destroyed; the house had duplicates.

Redirect examination by Mr. MATTHEWS:

Int. 1. What are all these things?

Ans. Invoices of goods that I started with and subsequent shipments. They are the original books and papers showing the whole account. These are marked by notary for identification, but not attached.

C. G. MEGRUE, JR.

I, W. H. Miner, a notary public within and for the county of Hamilton, in the State of Ohio, do hereby certify that C. G. Megrue, Jr., was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified; that the reason for taking said deposition was that the wit-

120 ness lived in New York city, State of New York, more than one hundred miles from the place of trial; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 2nd day of March, A. D. 1882.

[SEAL.]

W. H. MINER,
Notary Public as Aforesaid.

Notary's fees, $3.50, due notary.

121 EXHIBIT B.

STATE OF OHIO, *Hamilton County,* } ss:

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY, Defendant. } Case No. 3230.

Pending in the circuit court of the United States for the southern district of Ohio.

Deposition of Conduce G. Megrue, Jr., taken before me, Edward Barton, a notary public within and for the county of Hamilton, in the State of Ohio, by consent and agreement of the parties, on December 27th, 1883, at the office of Messrs. Lincoln & Stephens, in Cincinnati, in the county of Hamilton, in the State of Ohio, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the southern district of Ohio, in which The Switzerland Marine Insurance Company is plaintiff and The Louisville, Cincinnati and Lexington Railroad Company is defendant, Mr. C. B. Matthews being present on behalf of the plaintiff and Mr. T. D. Lincoln on behalf of the defendant.

122 CONDUCE G. MEGRUE, Jr., of lawful age, being first duly cautioned and sworn, deposes and says:

By Mr. MATTHEWS:

Ques. 1. State whether or not you are the same C. G. Megrue whose deposition has been heretofore taken in this case.

Ans. I am.

Ques. 2. Please state how frequently you traveled over the defendant's railroad between Cincinnati and Louisville previous to the loss of your trunk and valise of jewelry as described in your original deposition.

Ans. Probably three or four times.

Ques. 3. State whether or not they were business trips, and whether or not you had the trunk and valise of jewelry along with you on these occasions.

Ans. They were, and I had my baggage with me. I had my trunk and valise with me.

Ques. 4. Do you mean the trunk and valise full of jewelry that were afterwards lost?

Ans. I do.

Ques. 5. About how long before their loss were these trips made?

Ans. From sixty to ninety days before.

123 Ques. 6. State whether or not upon these trips, before the loss of the jewelry, the trunk and valise mentioned were received and checked as baggage.

Objected to.

Ans. They were.

Ques. 7. State whether or not you know anything touching the custom of the defendant, at the time of and before that loss by fire, as to the carrying of trunks of travelling salesmen as baggage.

Objected to.

Ans. It was their custom to check such trunks as ordinary baggage.

Ques. 8. How about charging therefor?

Ans. Baggage to the excess of an hundred and fifty pounds was charged extra for.

Ques. 9. Have you ever made any claim against the defendant arising out of the loss of this jewelry?

Ans. I have not.

Ques. 10. State whether or not you knew of the payment of the value of lost jewelry to Aiken, Lambert & Co. by the insurance company.

Ans. I did.

Ques. 11. State whether or not this was done with your consent and approval.

Ans. It was.

124 Ques. 12. Who owned the goods that were lost?

Ans. Aiken, Lambert & Co.

Cross-examination by Mr. LINCOLN:

Ques. 1. What is your age?

Ans. Twenty-nine years.

Ques. 2. How many times has your deposition been taken before in this case, and where?

Ans. Once before, in Cincinnati.

Ques. 3. In whose employ are you now?

Ans. Aiken, Lambert & Co.

Ques. 4. Had you any interest in the goods in the trunk or any insurance on them?

Ans. I had not.

Ques. 5. You say you have traveled over the road three or four times. When was that—when were the times?

Ans. From sixty to ninety days before the burning of the trunk.

Ques. 6. Were the three or four times within sixty or ninety days of the burning of the trunk?

Ans. To the best of my recollection, they were.

Ques. 7. During these three or four times where did you get your ticket and from what place was your baggage checked?

Ans. Ticket at the office of the company—the depot offices of the company—at Cincinnati and Louisville, travelling
125 back and forth. My baggage was checked from the depot baggage-room.

Ques. 8. Do you remember of having paid anything extra at any of these three or four times for baggage, for extra weight?

Ans. I think a portion of the time I did.

Ques. 9. You say you think; do you know?

Ans. I wouldn't state positively. To the best of my recollection I have, or think I have.

Ques. 10. Don't you know that they charged extra for all baggage of overweight?

Ans. I do. The weight of my baggage varies at different times.

Ques. 11. Your whole personal knowledge of the custom of the road prior to this transaction was your travelling over it three or four times, was it not?

Ans. Yes.

Ques. 12. Did you not have a valise containing your clothing and things commonly used by travellers?

Ans. I did.

Ques. 13. What became of that?

Ans. It was home.

Ques. 14. Did you receive pay for it from the railroad and for the clothing?

Ans. I did.

126 Ques. 15. Was it checked; if so, what was the number of the check?

Ans. It was; I do not recollect the number of the check.

Ques. 16. Was it one of the checks that was presented to you here when your deposition was taken before?

Ans. It was.

Ques. 17. It was one of the checks in the hands of Mr. Matthews, of counsel in this case?

Ans. I turned the check over to Mr. Matthews, and suppose they are the checks he now holds.

Ques. 18. You say that you know that the insurance company paid the money to Aiken, Lambert and Co.?

Ans. I did.

Ques. 19. How do you know; were you present when it was paid?

Ans. I was told by Mr. Aiken; besides, I think I saw the insurance company's check for the amount.

Ques. 20. Well, are you sure you saw the insurance company's check for the amount; and, if so, where did you see it?

Ans. I was shown it by the book-keeper in the office of Aiken, Lambert & Co.

127 Ques. 21. And all you know about its being paid is what you were told by Mr. Aiken and that you were shown the check by the book-keeper.

Ans. Yes.

Ques. 22. Can you state how the check was signed, by whom?

Ans. No; I cannot.

Ques. 23. You didn't know the signature of the party to the check or what authority he had to sign it, did you?

Ans. I did not.

Ques. 24. Could you repeat the check word for word and give the name of the party signing it, or did you notice it simply casually?

Ans. I cannot; I simply noticed it casually.

Re-examined by Mr. MATTHEWS:

Ques. 1. Were these trips you speak of round trips?

Ans. They were not; they were single trips.

Ques 2. On these trips did you ever notice in the baggage car or being received by the baggage-master trunks of other travelling salesmen as baggage?

Objected to.

Ans. I have.

CONDUCE G. MEGRUE, JR.

128 THE STATE OF OHIO, *Hamilton:*

I, Edward Barton, a notary public in and for said county and State above named, duly commissioned and qualified, do hereby certify that the above-named Conduce G. Megrue, Jr., was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by me in his presence, and was subscribed by said witness in my presence, and was taken pursuant to the consent and agreement of the parties at the time and place specified in the caption hereof, and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this twenty-seventh day of December, 1883.

[SEAL.] EDWARD BARTON,
Notary Public, Hamilton County, Ohio.

$2.00 due notary.

129 STATE OF OHIO, *Hamilton County,* } ss:

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY, Defendant.
} Case No. 3230.

Pending in the circuit court of the United States, southern district of Ohio.

The above-named defendant will take notice that on Monday, the 12 day of November, A. D. 1883, the plaintiff above named will take the depositions of George H. Bishop, Chas. J. Steinan, and sundry witnesses, to be used as evidence in the trial of the above cause, at the said office of Messrs. Matthews and Shoemaker, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and 6 o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

RAMSEY & MATTHEWS,
Att'y- for Plaintiff.

130 Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken is, by agreement, waived; also all exceptions as to time.

Done this 9th day of Nov., A. D. 1883.

LINCOLN & STEVENS,
Attorneys for Defendants.

131 EXHIBIT C.

Depositions of sundry witness- taken before me, Edward Barton, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notice, and at the time specified therein and by mutual consent, at the office of Messrs. Lincoln & Stephens, at Cincinnati, Hamilton county, Ohio, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the southern district of Ohio, in which The Switzerland Marine Insurance Company is plaintiff and The Louisville, Cincinnati and Lexington Railroad Company is defendant, C. B. Matthews, Esq., being present on behalf of the plaintiff and T. D. Lincoln, Esq., on behalf of defendant.

ABRAHAM G. SCHWAB, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

By Mr. MATTHEWS:

1st Question. State your name, age, residence, and occupation.

Ans. Abraham G. Schwab; age, 35; 368 W. 9th St., Cincinnati, Ohio; wholesale jeweler.

2nd Ques. State whether or not previous to the 10th day of
132 December, 1880, you were in the habit of travelling over the railroad of the defendant company; if so, how long had you been travelling; how frequent were your trips, and were you in the habit of taking sample jewelry trunks with you?

Ans. Yes, sir; I travelled over it at those times and previous to that at an average of one trip backwards and forwards in sixty (60) days at least, from 1870 on. I always when I traveled had my trunks with me. Sometimes I made trips on private business. I may have made a trip on private business, but not over once in five years, over that road.

Ques. Where and by whom are most or all of these jewelry-sample trunks made, and what similarity is there between them, and are they readily distinguishable from other trunks used by travelling salesmen?

Ans. Most of them are made by Crouch and Fitzgerald, of New York, and have been for several years. They are generally covered with black leather and bound heavily with iron, and they are generally about the same size or very near the same size. I should
133 think they are readily distinguishable. If I should see a jewelry trunk I could tell it at once.

(Objected to.)

Ques. 5. Are they readily distinguishable from hardware travelling trunks?

Ans. I am not quite sure what a hardware trunk looks like. I couldn't tell a hardware trunk if I should see it—that is, for sure. I don't know in what shape trunk hardware men generally carry their samples, but I do know a jewelry trunk.

6 Ques. Do you know whether hardware trunks and jewelry trunks are alike or not?

Ans. I don't think they are. I believe a hardware trunk is a trunk generally gotten up on cheaper principle than a jewelry trunk.

8 Ques. Do you remember the circumstance of a combined baggage, mail, and express car burning up on the night of December tenth, 1880, on the defendant's railroad near La Grange, Kentucky?

Ans. Yes, sir; I remember distinctly, because I had some express matter burnt up on the same car.

9. Ques. How near that time did you pass over this road
134 with your trunk—your jewelry-sample trunk?

Ans. Probably within two or four weeks.

Ques. 10. How familiar were the baggage and trainmen in the employ of the defendant with sample jewelry trunks, and state how you know that they had any knowledge of them, referring now to the date of December 10th, 1880, and previously?

(Ques. objected to by Mr. Lincoln as incompetent.)

Ans. Well, I should think the baggage-master could tell a jewelry trunk at once. Most baggage-masters knew my trunks and knew there was jewelry in them.

(Ans. objected to by Mr. Lincoln as being incompetent.)

11 Ques. Please answer the last part of my question.

Ans. The jewelry trunks are generally unusually heavy, and the baggage-master who would take hold of them would say, "Hello; what you got in there—jewelry?" Which I couldn't deny if they would ask me that question.

(Ans. objected to by Mr. Lincoln as being incompetent.)

12 Question. State whether or not your sample trunks were received and checked as baggage by the defendant Co. always
135 when you took them with you.

(Ans. objected to by Mr. Lincoln.)

Ans. I always had them checked as baggage.

13 Ques. What was their custom when they weighed over a hundred and fifty pounds?

Ans. They charged for overweight, perhaps 25 or 50 cts. a hundred pounds, according to the distance.

14 Ques. How long had the defendant, to your knowledge, been receiving, checking, and carrying as baggage, for yourself and others, jewelry-sample trunks?

(Defendant's counsel objects to his stating anything about others unless he happened to be present.)

Ans. Ever since I have been travelling. I can't answer for others. I always had my trunk checked ever since I have been travelling.

15 Ques. Have you never seen other travelling salesmen having jewelry-sample trunks checked as baggage by defendant's road, and over what time has your observation extended as to others?

(Ques. objected to by defendant's counsel.)

Ans. I have always met other jewelry travellers when I have
136 travelled, or very often met them, on the same road, and noticed that they had their trunks checked the same as I did. My observation has extended over 14 years.

Cross-examined by Mr. LINCOLN:

1st Ques. Don't you know baggage is often checked at the house?

Ans. I am not always present when they had the trunks checked at the house. I was present at the depot when they had them checked there—that is, if I happened to be there.

2nd Ques. You do not claim to know what contract they had with the man checking them?

Ans. I do know they had them checked in the same way as I had mine checked. I know of instances that way. I do not know of any of them making any other contract.

Objected to. Passed.

3 Ques. Do you pretend to say that you stood there and listened to the contract that other parties in which you were not interested made with the man checking the baggage?

Ans. I noticed that they would ask the baggage-master to check their trunks, receive their checks, and walk off, the same
137 *same* as I did.

4 Ques. Do you claim to know all that was said between those parties?

Ans. Sometimes I would see or hear everything that was going on, and sometimes I would walk off after I had my check.

5 Ques. Now state an instance of checking, who the man was that did the checking at the railroad, who the man was that received it, and what was said at the time between them, and when and where it was that this took place.

Ans. I couldn't answer that question just now, but if I would have a little time to think or look up I could cite lots of instances of that kind; as to the baggage-master that did the checking, it wouldn't interest me who he was nor what his name was.

6 Ques. By that you mean that you saw the party get his baggage checked; isn't that all you mean?

Ans. Yes, sir; that's what I mean. I saw him get his baggage checked.

7 Ques. You do not mean to say that you could always remember what took place between the man checking the baggage and
138 the man who got his baggage checked, do you?

Ans. Not always.

8 Ques. Well, could you remember it at all when you had no interest in it, and especially, as you have said, when you got your baggage checked you walked off?

Ans. Certainly, I could remember it, because very often a fellow-traveller would be a friend of mine, and we would compare notes and see how cheap we got off on our extra baggage.

9 Ques. When would you compare notes? Wasn't it after the checking was done and you were passing away from the check-man?

Ans. Yes, sir; after we had our checks; after we had left the checkman.

10 Ques. Then the information you got about it was by comparing notes with one another after you had left the checkman, and you think, do you, that you could repeat what was said from that reason?

Ans. Yes, sir.

11 Ques. To whom did you pay the extra when you paid it?

Ans. To the same man that handed me my checks.

139 12 Ques. Do you know what became of the money you handed the man receiving the baggage; if so, how do you know what became of it?

Ans. In most instances I get a receipt for the money I pay as this excess, and I take it for granted the baggage-master turns the money over to the company, if he is honest.

13 Ques. And don't you know that that's the usage with all baggage where it's extra weight?

Ans. Yes; that's the general custom.

14 Ques. And it is because the baggage is of extra weight that they charge additional compensation, is it not?

Ans. That is the only reason they ever charged me for it.

15 Ques. Don't you know that the baggage is often checked at the hotels by the wagon men who go for it?

Ans. I know that.

16 Ques. All characters of baggage are thus checked at the hotel where the omnibus called for it and a separate wagon is sent.

Ans. They wouldn't hesitate to check it, no matter what
140 the shape of the trunk was, unless it was overweight.

Objected to. Passed.

17 Ques. Where do I understand your place of business is?

Ans. 53 W. 5th St., Johnson building.

Re-examined by Mr. MATTHEWS:

1 Ques. Do you mean to say that your only knowledge that other salesmen had jewelry trunks checked as baggage was derived from a comparison of notes with them, or did you see it done in many instances?

Ans. In a great many instances I saw it done and was right there when the baggage was checked.

Recross-examined by Mr. LINCOLN:

1 Ques. But you don't know what they had in those trunks, of your own knowledge?

Ans. Certainly I do.

2 Ques. How do you know, if you were not present when the trunk was packed?

Ans. Because we stopped together at the same hotels and sold goods to the same customers.

3 Ques. Do you know that there was nothing but jewelry in there?

Ans. Yes; there might have been a coat or a shirt, but jew-
141 elers generally carry jewelry in their trunks.

4 Ques. And it is those instances only when you stopped at the same hotel and sold to the same customers that you know that they had jewelry in their trunks?

Ans. Those are not the only instances. When I would meet a jewelry traveler whom I knew personally it would make no difference if he would stop at the Galt House, in Louisville, and I at the Louisville Hotel, when we came to the depot we both had jewelry trunks beyond a doubt in my mind.

5 Ques. But you could not tell that that friend had jewelry in his trunk unless you saw him pack it up, could you?

Ans. No, sir; he might have sold his goods out and filled it with bricks.

A. G. SCHWAB.

142 STATE OF OHIO, }
Hamilton County, } ss:

I, Edward Barton, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Abraham G. Schwab (omission of whose name from the notice was duly waived) was by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by me and was subscribed by the said witness in my presence; that said deposition was taken at the time specified in the notice hereto attached, the place being, by consent of the parties, at the office of defendant's counsel in Cincinnati, Ohio, and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 12th day of November, A. D. 1883.

[SEAL.] EDWARD BARTON,
Notary Public.

143 1st. Here name all the witnesses whose depositions have been taken.

2nd. The attorney or others may write the questions. The answers in Ohio cases must be written either by the officer taking the depositions, in the presence of the witness, by the witness in presence of the officer, or by some disinterested person in presence of said officer and of the witness. In United States cases by said officer or by the witness in the officer's presence, and by no other person, and the officer must certify accordingly. Therefore, write here "myself, in the presence of the witness," or "myself, in presence of the witnesses, respectively," or "said witness in my presence," or "said witnesses, respectively, in my presence," or "C D, who is not interested in the suit, in my presence and in presence of the witness" (or "witnesses, respectively"), or otherwise, according to the fact, if a part were written by the officer and a part by other authorized persons.

3rd. If the deposition is to be used in any United States district or circuit court the certificate must also state the reasons for taking the depositions, as that the witness lives more than a hundred miles from the place of trial; that he is bound on a voyage to sea;
144 that he is ancient and infirm, etc. In such cases add here, "I further certify that," etc., as required.

Costs.

In Ohio cases.—The officer taking the depositions is entitled to the fees set forth in the cost bill below.

In United States cases.—United States commissioners and notaries public are entitled to 10 cents for each oath administered, 20 cents for each one hundred words (each figure being counted one word) in depositions and certificates, and 25 cents for each subpena. In United States cases witnesses are entitled to $1.50 a day and mileage as below. The depositions may be retained by the officer taking them till these costs are paid.

Cost Bill.

Writing and certifying depositions, at 20 cents per hundred words	$4 00
Subpena of witnesses, 25 cents	25
Swearing witnesses, 10 cents	10
Clerk's certificate and stamp	
Postage and other necessary expenses (act. cost)	
Attachment of witness, 50 cts. each	
Commit. of witness, 50 cts. each	

Constable's Fees.

Service of subpena	$
145 Mileage on subpena	
Due notary	$4 35

Witness Fees.

(At 75 cents per day and 5 cents traveling fees, each way, if not less than one mile)	$1 50
Due witness	$1 50
Total cost of taking depositions	$5 85

Received of —— —— the sum of $—, in full of my fees, as above specified, and also $—, in full of constable's fees. The witnesses were paid their fees by —— ——.

146 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division:

THE SWITZERLAND INS. CO., Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO, Defendant. } Case No. 3230.

Pending in the circuit court of the United States in and for the southern district of Ohio, western division.

The above-named defendant will take notice that on Friday, the 30th day of November, A. D. 1882, the plaintiff above named will take the depositions of H. Griswold, W. L. Duff, and Thomas M. Dear, sundry witnesses, to be used as evidence in the trial of the above cause, at the law office of William O. and John L. Dodd, corner of Center and Greer streets, Louisville, in the county of ——, in the State of Kentucky, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

C. B. MATTHEWS,
Att'y for Pl'ff.

147 Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

Done this 31st day of Oct., 1882.

LINCOLN, STEPHENS & SLATTERY,
Attorney- for Def't.

148 Charles A. Graham, official stenographer, Louisville, Ky.

"C" AND "F" EXHIBITS.

(1.)

The deposition of W. L. Duff & Hamilton Griswold, taken on the 3rd day of November, 1882, at the law office of W. C. & J. L. Dodd, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the plaintiff in an action between The Switzerland Ins. Co., plaintiff, and L., C. & L. R'y Co., defendant, now pending in the United States circuit court for S. D. Ohio, western division, both parties, by attorney, being present.

W. L. DUFF, being duly sworn and examined by Mr. Dodd, as attorney for the plaintiff, deposed as follows:

Interrogatory 1.

149 In place of taxing the testimony of Thomas M. Dear, appointed to be taken here to-day, it is agreed by the parties that the Louisville, Cincinnati, and Lexington Railway Company was operating an express on its own account, and that Isaac S. Maddox was the messenger in charge of the express matter at the time of the fire on the night in question as the express messenger of that road, and occupied the express end of the baggage car; that the Adams Express Co. were running an express on their account and occupied the same end of the car, which was under an order of the circuit court of the United States for the district of Kentucky, and that their agent was Price, who occupied the same end of the car. The matter in that end of the car was under the control and in the charge of these two express messengers. The Adams Express agent was there under said order of the court requiring the defendants to receive such agent, and which said order is hereto attached, marked "A."

150 EXHIBIT E.

The deposition of W. L. DUFF, taken at the time and place mentioned in the caption, and in the behalf of the plaintiffs.

The said witness, being duly sworn by me, deposed as follows:

Direct examination by Mr. DODD:

1. What is your residence, age, and present occupation?
A. At present I am not doing anything; age, 24; residence, Louisville, Ky.
2. Were you at any time in the employ of the defendant, The Louisville, Cincinnati, and Lexington Railway Company?
A. I was a brakesman at one time.
3. Were you in the employ of the defendant at the time of the fire at which the baggage and express car were burned?
A. Yes, sir.

4. Where did that occur, and when?

A. It occurred just above the Cincinnati junction—just above the Lexington and Frankfort junction.

5. On the line of the road of the defendant?

A. Yes, sir; on the Short Line.

6. Is that junction near La Grange, Ky.?

A. Just above La Grange—I reckon a mile or three-quarters.

151 7. Do you remember when that occurred?

A. No, sir; I do not exactly. It has been a year or two ago. I have not been working for the company for some time. I know that it was pretty cold.

8. Is it your present recollection that it was about the month of December?

A. As near as I recollect I was offered a Christmas gift by the agent of the Adams Express Company there. It was near Christmas, I am pretty certain.

9. At what time of the day or night did that fire occur?

A. The train left at eight something, and got in there at twelve twenty. I believe it was near twelve o'clock that the thing occurred—about twelve. I have no distinct recollection of the time.

10. Was it in the night?

A. Yes, sir.

11. Was that on a passenger train?

A. Yes, sir.

12. Was that train coming from Cincinnati to Louisville?

A. It was.

13. What car or cars composed the train?

152 A. I think there was two sleeping cars, a ladies' car, a smoking car, a baggage and express car, and a postal car.

14. Do you know what position in the train the postal car occupied?

A. It was right next to the engine.

15. What car was next to it?

A. The baggage car.

15½. Were the baggage and express cars the same coach?

A. Yes, sir; in the same coach. One department was the express, one the mail, and one the baggage.

16. What part was the mail?

A. The middle.

17. Which end was the express?

A. The front end.

18. The express was next to the mail—in front?

A. Yes, sir.

19. On what part of the train were the brakesmen that evening?

A. In the front end of the hind sleeper.

20. Did you see the fire?

A. I didn't until the cars slowed up. They had come very near to a stand when I got out of the car.

21. You didn't see the fire before the coach stopped?

An. Not until I got down.

153 22. Did the train stop at a station or on a switch?

A. I think it stopped this side of the Lexington switch; just this side of the junction switch there.

23. Did the whistle blow to stop?

A. I don't know whether the whistle blowed. I think it is customary to blow for it to stop, but I don't know whether it blew; I don't recollect anything about that; I don't recollect whether it blew. There was so much excitement that I could not tell.

24. When you got out what did you do and see?

A. Just the minute that I got out of the car I ran down to the express car. I always knew that they carried a good deal of valuables in the safe, and I thought that I would go down there and do the best that I could and help. When I got there I saw the messenger standing out on this side of the train—we were coming down towards Louisville, and he was standing on the right-hand side. The messengers were on that side, and I got down on that side, too.

Then I ran to get in the baggage car, and I found that the door
154 was locked, and I didn't wait for anything else, but I ran right around to the express car and jumped in the express-car door and hollered to Price where was his safe. He didn't answer me, but Maddox said, "Mine is in there." I looked around at Maddox, and the fire was coming out of the door on the left-hand side. It was so warm that I could not get it. There was no fire in the express end at the time that I looked around. I could not see anything when I looked around; it was dark, and the smoke was in the car. I tried to get his safe, and I could not reach it. I felt around with my foot and I could not reach it, and I thought that I would take no chances of getting burned; it didn't benefit me in particular. I thought I would just reach over and get hold of that and throw it out of the door. Then I jumped out and ran around to get in the baggage end. Then the baggage door was open. I don't know whether it was unlocked or broken. The door was not

broken, I think. I ran around and got out three trunks, if
155 I am not mistaken. I tried to get out another one, and the brakesmen, Mr. Gorley, was with me. We both got another trunk out. I think there was about four trunks saved; I know that I got out three. I was trying to get another trunk that I didn't know what it was at the time. I tried to get it out. It was a small trunk lying on the floor. It was too heavy, and I said, "Louis, I can't get this trunk; it is too heavy for me." I then hollered to some of the men to give me an axe. I tried to break the door off of the hinges, and thought that I could reach down and get some more trunks. There was some clothing trunks. The baggage car was burning up, and I thought that I would not hurt anything by breaking it up. I thought I would reach around to get the things, but I could not break the door open; I didn't break it.

25. What door was that?

A. The baggage-car door, on the end of the car.

26. I understood you to say that one of the baggage-car doors was open?

156 A. It was open—this door that I tried to break. I tried to break it off of the hinges to get it off. I tried to get some-

thing, but by that time the fire from the postal car had caught the doap bucket, and a flame of that gushed right out at the side—the back end of the door that I was trying to get at—and liked to have caught me. I coughed and went off, and we had to get down and let the thing burn. During that time the fire had caught in the express car. I thought I would get in and break the door in the front end of the express car—that is, the end right this way from the postal—but I could not break it open because the goods were packed up against the door, and I could not break it open, and we had to let the thing burn. That is about all that we could do; but I did cut the postal car off from the baggage car. One of the postal clerks helped—I don't know who it was. We cut the postal car off from the baggage car.

27. When you speak of the fire getting from the postal car into the doak bucket do you mean the postal car detached or the postal division of the baggage car?

157 A. It is the division of the baggage car; the center of the baggage car is the postal division. The doak bucket sits off to one side to keep it warm so that we won't have any trouble in packing hot boxes. It got so hot that it caught fire and then a big gush of flames came out of the baggage-car door—the front end of the baggage-car door. The end one way is the baggage car; that was the end toward Cincinnati, and the other end is the express end.

28. That night were the doors on the side of the baggage car open?

A. None but the one that I got into the express car.

29. Are there not two doors to the baggage end of the car and an end door?

A. In the center there is the postal car; that is where they throw in the mail. In the center, between the front end of the express car and the side of the postal car, there is a side door in the express end; then there is a side door by the baggage end.

30. Is not that on both sides of the car?

A. Yes, sir; on both sides.

158 31. Were either of those doors to the baggage end open?

A. Neither one, I don't think. I am pretty positive that neither was open. The express end was open. That is where the messengers got out, I suppose.

32. Was that the side door to the express end?

A. Yes, sir.

33. Were both of the express side doors open or only one?

A. Only one, I think.

34. Was there any messenger in charge of the mail department of that baggage coach on that night?

A. I don't think they held the messengers capable of taking charge of the mail. I think the baggage-master has charge of the mail until it gets to Louisville, because he most always transfers it.

Objected to.

35. Was there any messenger in that division of the car that night other than the baggage-master?

A. The baggage-master at the time of the fire was not in the car at all.

36. Was there any sort of individual in that department of
159 the car that night, excluding the baggage-master; was there any employee of the company?

A. No, sir.

37. There was no employee of the Government to take charge of these mails?

A. No, sir; there was none on that night.

38. Was there any mail matter in that division of the car that evening—in the mail department?

A. Yes, sir; there was right smart.

39. Did you assist in putting in that mail that night?

A. I don't say for certain, but I think that I helped to put it in, because it was my place to help.

40. When you came forward to the baggage car did you see the fire?

A. No, sir; there was no fire in the baggage car.

41. Did you see any fire in any part of that coach when you got out and got forward?

A. Not in any part of the baggage car, but in the center of the car, in the mail department.

42. Did you see the fire?

A. I saw that.

43. See the blaze?

160 A. I saw the blaze coming out of the side door—towards the left-hand side coming down.

44. Do you know in what part of the car the fire originated?

A. In the mail department.

45. You say that the baggage-master was not in the baggage — at the time that you got there?

A. No, sir.

46. And that that car was locked?

A. Yes, sir.

47. Where was the baggage-master?

A. I don't know, unless he was in the smoking car; I could not say where he was, because I was in the hind end of the sleeping car.

48. Did you see him when you came forward?

A. No, sir; not until after I tried the door.

49. Did you see the conductor of the train, Mr. Griswold?

A. No, sir; I don't think I did; not until after I got around in the express-car end.

50. When you tried the baggage-car door could you, if that door had not been locked, have saved the baggage end before it was destroyed?

A. My intention was to run to the side door and throw out all the trunks that I could, and I believe from the time that I
161 first tried to get in the door until the time that it caught so much afire that I could have saved very near every bit of it.

51. Could you, with the assistance of the baggage-master, have saved it?

A. Every bit of it, I think.

52. Was it a heavy load of baggage that night?

A. I think there were two or three—I am pretty certain—clothing trunks—sample trunks; two or three sample trunks.

53. What do you mean by sample trunks?

A. They are an extra heavy trunk that traveling men have to protect their goods and keeping them from getting broke and rough treatment.

54. Are these sample trunks easily distinguished from the ordinary traveling trunks?

A. Yes, sir; I think they are always made a little heavier, and you can tell them, unless there are some parties traveling that has made his trunks a little heavier to protect his goods.

55. Were those sample trunks destroyed?

A. They were burned up.

56. Was the car burned up?

A. Every bit.

162 56½. Was it moved off on a switch?

A. Just as soon as they could get a chance, after the main part of it was burned up, they moved it off onto a side switch, but they sent me out before they moved it back; they sent me to flag a train that was coming, and I didn't get back to see what was going on. I didn't see the whole thing burn up. After the thing was destroyed pretty much they sent me back to flag a train.

57. Was or not the coach in flames before you were sent back?

A. Yes, sir; the car was very near all destroyed before I was sent back.

58. Were you in the habit at any time of going into the express car on the trips between Cincinnati and Louisville at night?

A. Yes, sir; very often I would go in.

59. Did both of the express messengers occupy the same end of the car?

A. Yes, sir; the same end.

60. Do you know whether those express messengers kept awake on the trips between those points or not?

Question objected to by counsel for the defendant.

163 A. I have seen them asleep at times.

61. Do you know whether there was any fire in the stoves in the baggage or express car that night?

A. I don't think the stove in the baggage car had any fire in it at all—well, well, it had a small fire, but I never went in the express end of the car that night, and I don't know whether they had much of a fire or not.

62. Are these stoves made and set so as to heat the mail department of that coach—either or both of the stoves?

A. Sometimes you will find a baggage car with a hole in the express end, so as to heat the mail department, and at other times you will find the baggage end cut out.

63. You mean a hole cut through to the mail department?

A. Yes, sir; to give the heat to the mail end.

64. Did you have any conversation with Maddox, the express messenger on that train, as to how the fire occurred?

Question objected to by counsel for the defendant.

A. Yes, sir; I had a talk with him.

67. Were you or any of the other employees notified while
164 the fire was in progress, by any passenger, of the contents of any trunk in that baggage car?

Question objected to by counsel for the defendant.

A. If I am not mistaken, and I am pos-tive, there was a gentleman ran up and hollered that there was a trunk in there that there was five thousand dollars' worth of jewelry in it. He says: "For God's sake save that trunk; there is five thousand dollars' — of jewelry in it."

68. Was it saved?

A. No, sir; it was not.

69. You were in the employ of the road at that time?

A. Yes, sir; as brakesman.

70. How many other brakesmen were on that train?

A. One other brakesman, baggage-master, conductor, and two express messengers.

71. Did the baggage-master help you to get any trunks out of the baggage car?

A. No, sir; not until I got out the last trunk. I don't think that he was in the car at all. He might have been in the car after I got all the trunks out that I could. I don't think he saved any.

165 72. Did you succeed in breaking the side doors of the baggage car at all before it was burned up?

A. No, sir; I don't think we broke the door.

73. Did the express messengers, either of them, help you to get out any of the baggage?

A. No, sir; they didn't help me.

74. Were any of the trunks in the baggage car on fire when you first found that door open—the baggage-car door?

A. No, sir.

75. If the baggage-master had been in the baggage car at the time could he or could he not have saved the trunks in that car?

Question objected to by counsel for defendant.

A. Yes, sir; I think he could. He was a man that always attended to his business; always up to that night. He was not in the car that night. I never saw any neglect in his duty up to that night.

76. Was there any attempt to put the fire out after you came around by any person?

A. I don't think there was but one bucket of water thrown on it, and I threw that. I don't think anybody else threw a bucket on it. The water was hard to get at.

166 77. Were you subpœnaed to go to Cincinnati last week to testify in this case in behalf of the defendant?

A. Yes, sir; I was told to go there.

78. Did you go?

A. Yes, sir.

79. Did you testify?

A. No, sir; I didn't give any testimony, I don't think. I was not called.

80. You talked with the lawyers for the defendant?

A. Yes, sir; one of them asked me a question or two.

81. You answered those questions, did you not?

A. Yes, sir.

Objected.

Cross-examination by Mr. LINCOLN:

1. Was it not late in the afternoon when you had the talk with the lawyer that you speak of?

A. Yes, sir.

2. There had been three depositions taken during the day, had there not?

A. I don't know. I know that Mr. Gorley's deposition was taken, and I think —— —— was taken.

3. Did you tell him what you knew?

A. I don't know that I did, in full.

167 4. When you first got to the car the side door of the express end of the car was open, was it?

A. Yes, sir.

5. Where was Mr. Price standing?

A. Price and Maddox were both standing side by side on the right of the track.

6. Had either of them been injured?

A. I think both were burned; *there* were standing there holding their hands.

7. When you first saw the fire where was it coming from?

A. Out of the side door of the postal division.

8. Did you have any conversation with Price about the fire?

A. No, sir; I never had any conversation with Price; I talked to him and asked him about his being burned.

9. Did you have any conversation about how it happened?

A. No, sir.

10. Price was the agent of the Adams Express Co.?

A. Yes, sir.

11. He had charge of their baggage, had he?

A. Yes, sir.

12. You say the fire when you first saw it was coming out of the mail department?

A. Yes, sir.

13. When you first got in there was there much smoke?

168 A. Yes, sir; it was quite smoky.

14. When you first went into the express end it was quite smoky?

A. Yes, sir.

15. Did you notice fire there?

A. There was not a bit in it.

16. Did you see any fire at the time?

A. I saw the fire as it came out of the side door; Maddox' safe sat right at the left of the—right by the door of the mail department of that car, and the fire was coming right over his safe, and I says to Price before I looked around, "Where is your safe?" He didn't say a word, but Maddox said, "Mine is in there," and I looked around and the fire was so hot over his safe that I was not going to take any chances to get it.

17. Was not his safe nearer the express part of the car than the baggage?

A. I think it was nearer the baggage car; it set near that side door—nearer the baggage car than the express car.

18. Was it in the passage-way?

A. Yes, sir; in the alley or passage way.

19. Was that a safe that ought to have been in the express-room?

169 A. Their orders is to always keep the express safe near the door. It was near the door, but it was near the little side door of the mail end.

20. The opening which heated the mail-room—was not it an opening from the express end of the car?

A. Yes, sir; I think the opening was right at the express end of the car—little iron bars ran down.

21. There are bars to protect the mail matter?

A. Yes, sir.

22. And the stove was right opposite those bars?

A. Yes, sir.

23. And an opening through?

A. Yes, sir.

24. A pretty cold night, was it not?

A. Yes, sir; it was right cold.

25. Don't you know the reason that Madden, the baggage-master, was out of the car was that he had been helping to cool down the hot boxes and had got his feet damp and cold?

A. He was out of the car helping to cool down the hot boxes, but it was the brakesmen's place to do this work.

170 26. Don't you know that it was also a part of his duty to assist in that work?

A. I don't know, sir; I had not been working for them but a year, and I didn't know really the duties of the railroad.

27. Don't you know that he got his feet wet and got cold in assisting to put out the hot box, and that he had gone in the smoking car to warm himself?

A. I could not say whether his feet were wet or not. I know that I was in the sleeping car, and I think that that is as cold a place as there is on a railroad train, and I was standing my cold feet; I had no fire to go to to get my feet warm.

28. You don't know, then?

A. No, sir.

30. Did you have any conversation with him about it?

A. No, sir.

30. It was a pretty cold night?

A. Yes, sir. I took two tramps down that night, and I know that it was pretty cold.

31. In which end of that car did you first observe that fire—which end of the car was on fire; in which end of the car—the baggage end or the express end—did you first notice to be on fire?

171 A. The first time that I noticed it was in the mail department; then it caught fire from the express department; then the express car was right smart on fire before the baggage end caught fire—the express end.

32. Who had charge of that end of the car—the express end?

A. Maddox and Price.

33. In the baggage end of the car was there not a very large trunk, which was the trunk of a bride; I think she was the daughter of the secretary of the Senate, on her way to Nashville?

A. I had gotten out two trunks, and some one said—a gentleman says, "Ain't I lucky; I have got out my trunks." They said they were a bride and groom. I think there were two bridal couples on there. I think one was burned up and the other saved.

34. Was not there some large trunks—Saratoga trunks?

A. I think these trunks were large covered trunks; I never noticed any Saratoga trunks.

35. When you first got into the baggage car there was no blaze there or fire?

172 A. No, sir.

36. Were there any means, such as water, of putting out the fire?

A. No, sir; not handy. There was no water about. I would have tried to get water myself, but there was not any handy, and I thought that I could do more by trying to save things without trying to get water. There was not any water about, and it was too much trouble to get it out of the engine.

37. Was not the car so far on fire that it was not possible to save it after you got there?

A. If we could have got any water handy we could have put it out.

38. Was there any water handy?

A. No, sir; I don't think there was, only at the engine, and that was low down. It is pretty hard to get water from the engine and get it by buckets full.

39. Is it not a fact, in your opinion, that the car was so far gone that you could not save the car?

A. If I could have got into the baggage car I could have saved something—if I could have got in at the time—but after fool-

173 ing around, and no one trying to help much but me—they fooled around so much that everything got burned up.

Passed.

40. Do I understand you that you think that you could have saved the car?

A. No, sir; we could not have saved the car.

41. What you mean is that you think that you could have saved something more than you did save out of the car?

A. Yes, sir.

42. That is all you mean to say?

A. Yes, sir.

43. Was there not an alarm—some confusion?

A. There was after the train had stopped and the people got out and found out what was going on. There was some excitement and running about.

44. A good deal of confusion?

A. Yes, sir; there was some excitement. There was no trouble or anything of that kind.

45. Are you not mistaken when you say that there was right smart mail that night? Don't you know that they missed connection with the down mail?

A. Sometimes they have a good deal of mail if they do miss connection. There was a postal car.

174 46. Don't you know that there was a small amount of mail in the mail department?

A. I am not certain. Sometimes they miss connection and hold it over. They might have missed the connection and given it to us. I think there was a right smart amount.

47. The baggage man would know more about that than you?

A. He was right there. I was the only brakesmant hat ever did help the baggage-master. I thought that I had better do it than to have any trouble about it.

48. Were you on good terms with the conductor, Griswold?

A. Yes, sir; up to the night of the fire, I think I was. We did have a little dispute about that; we made it up all right. That night I happened to be asleep—I happened to be asleep and he came back and caught me asleep—and he reported me, but it didn't amount to anything. At the time that I quit the road he showed a little more favors, I thought, to the other brakesman than

175 to me. I didn't have as much money to throw away as he did. He got mad at me, and I told him what I thought of him and just quit.

49. Did you quit voluntarily, or were you discharged?

A. I just quit the road.

50. You were not discharged?

A. No, sir; I was not. I don't think I was discharged. I believe I had a fuss with him one Sunday morning. He wanted to act smart up there at the head of the street, and I told him he could take his old road and keep it; I was not compelled to work for the railroad.

W. L. DUFF.

176 "EXHIBIT F."

Also the deposition of HAMILTON GRISWOLD, taken at the same time and place and in the same behalf. The said witness, being duly sworn by me, deposed as follows:

Direct examination by Mr. DODD:

1. State your age, residence, and present occupation.

A. My age is 37; residence, Louisville, Ky.; I am book-keeper at the Pictect Artificial Ice Co.'s, Limited.

2. Were you in the employ of the defendant, The Louisville, Cincinnati and Lexington R. R. Co., in the month of December, 1880; and, if so, in what capacity?

A. I was a conductor on the road from here to Cincinnati.

3. On the defendant's road?

A. Yes, sir; on the defendant's road.

4. Were you conductor on a passenger train?

A. Yes, sir.

5. Were you conductor on a train in the month of December, 1880, when the baggage and express car burned near La Grange, Ky.?

A. Yes, sir.

177 6. Were you in charge of the car that night as conductor?

A. I was in charge of the train; yes, sir.

7. That fire occurred at night, did it not?

A. Yes, sir.

8. About what hour?

A. To the best of my recollection it was about—I could not tell you without I could see my report. I made out a report for the company that I would be willing to swear by.

9. What time were you due in Louisville that night?

A. I think our time here was 12.30—probably 12 o'clock. They changed the time so often and I ran on so many different time cards that it — almost impossible to recollect.

10. If your train was on time that night it must have been somewhere in the neighborhood of 12 o'clock when the fire occurred?

A. Between half past eleven and twelve, to the best of my recollection.

11. How and when did you first discover that fire?

A. I was sitting in the smoking car, on one of the rear seats. The baggage-master was sitting in the seat ahead of me. We had left Sulphur, and the whistle blew for the crossing, I think—yes, sir;

178 the whistle blew for the crossing. I asked the baggage-master to look out the window and see if that box was hot; we had been bothered by a hot box. He looked out of the window and he told me no; that he didn't think it was. A few minutes afterwards—I suppose we had gone probably ten or twelve miles—ten miles, perhaps—I told him again, "Mike, look out of the window and see if that box is hot." We were nearing the junction, and he looked out and said, "There is something on fire." With that he started towards the

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The Fire & Marine Insurance Co
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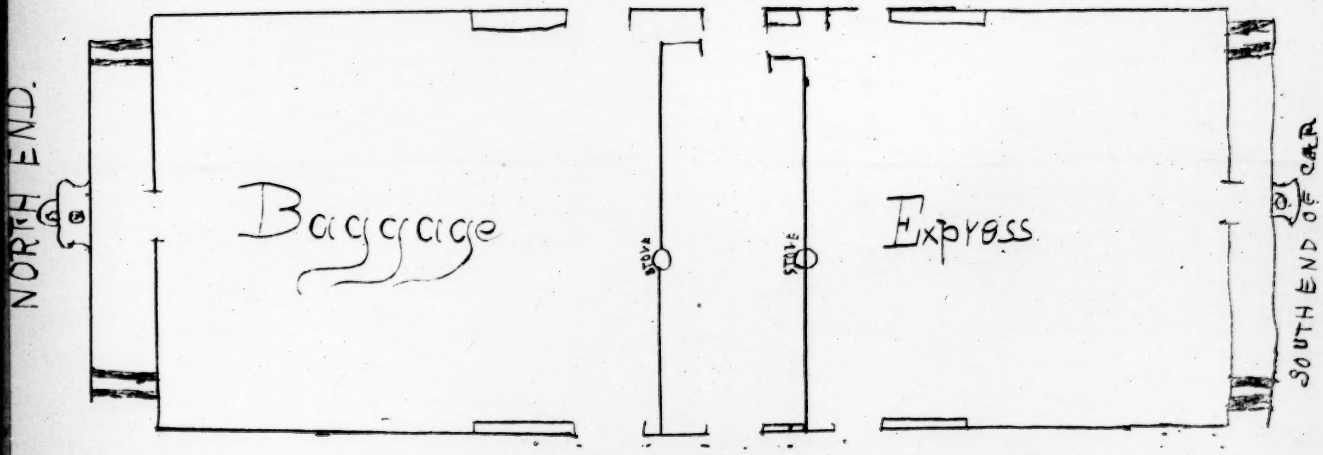

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door and I followed. I ran by him, and just at the time that I caught up with him I saw that it looked like there was no light in the baggage car; it was dark. I knew that there was a lamp in there, for I had left there but a few minutes before. He says, "Oh, my God! the baggage car is on fire." We were then at the junction and I was trying to pull the bell cord, and it would not pull; it came through, I think; but the engineer had checked up the train by that time and I jumped off of the train. The train had
180 stopped. I then cut the car loose and motioned the engineer ahead, pulling the postal and the baggage about twenty or thirty feet from the main train, and about the time that he stopped the flames—just about the time that he stopped I saw a man jump out of the doors on the side of the express car, followed by the flames over his head. The flames rushed about the same time that he did. It looked like as soon as he let the air in—that it must have been smoldering there, and as soon as they let the air in the flames burst out.

12. This was a regular down passenger train?

A. Yes, sir.

13. How was that baggage car constructed?

A. It was constructed into three apartments; there was communication between one and the other. There was an apartment in the center of that car that was used for carrying the mail bags; it was the mail department—generally used to carry the bags. I attach a roughly-drawn diagram, made by myself, showing the construction of the car, and make it a part of my deposition, marked "B."

(Here follows diagram marked p. 179.)

14. You say the baggage-master was not in the car?

181 A. No, sir; he was not in the baggage car.

15. When did he leave the baggage car?

A. He was in and out of the baggage car several times—two or three times after leaving Worthville; I did not notice particularly the points of the road.

16. He was with you in the front passenger coach, or smoking coach, of the train?

A. Yes, sir.

17. Was the baggage car locked?

A. No, sir.

18. You think it was not locked?

A. No, sir; it was not locked; the rear door was not locked.

19. Was there any person in there with the baggage when he was out?

A. No, sir; not with the baggage.

20. When you got back to the car where was the principal seat of the fire?

A. The flames I saw bursting out of the express end of the car first, right over the doors; it came over the door as they opened it. These men jumped out—the express messengers—both of them.

21. Was there any fire in the baggage end?

A. I could not say whether it was fire or smoke; I could not get in there.

182 22. How much baggage did you have that night?

A. I think there was nine or ten pieces.

23. How many pieces, if any, were saved?

A. I think there were five or six saved; that is my recollection.

24. Do you know whether the express messengers in the express end of the car were awake or asleep at the time?

A. I could not say.

25. Were you in the habit, on your trips between here and Cincinnati, of going into that car at any time of night—the express end of that car?

Objection.

A. Yes, sir.

26. Do you know whether it was customary for those messengers to remain awake or asleep?

A. I have caught them asleep several times.

27. Both?

A. Yes, sir; both of them.

28. There were two messengers in the express end of that car that night?

A. Yes, sir.

29. Do you know whether you went into their end of the car after leaving Cincinnati that night or not?

183 A. Oh, yes, sir; I went into that end of the car to see whether there were any passengers in there.

30. That was just after leaving Cincinnati?

A. Yes, sir.

31. Did you go in there at any later time?

A. No, sir; not in there; but I went into the baggage car several times during the night. I walked in there to see if everything was all right.

32. How long were you conductor of a passenger train on that road?

A. My impression is that I ran on a passenger train for the company three years and six months. I think it is about that. I know that I never missed a day during all the time that I was employed by them.

33. Do commercial travelers or drummers frequently, or at all, travel over that line of railway?

A. Yes, sir.

34. Were they frequent customers of the road or not?

Objected.

A. Yes, sir.

35. Do you know the character of the trunks that are usually carried by drummers?

A. Yes; I know the character of them?

184 36. By appearance?

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L. C. & L. R.R. Co. } p 186
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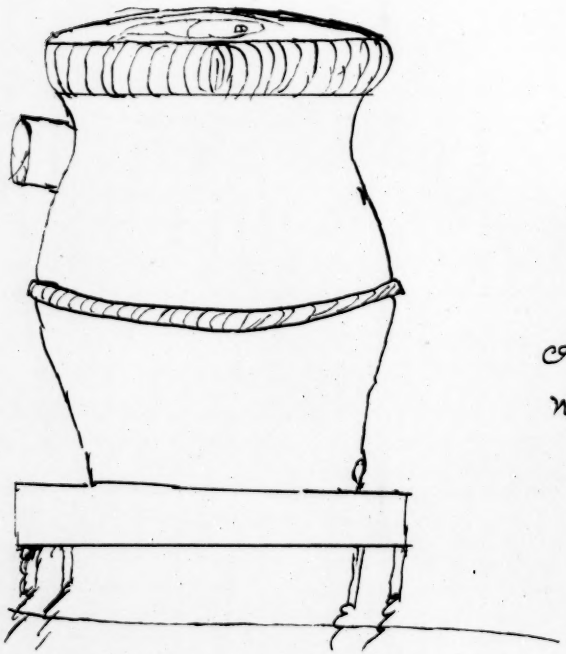

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A. Yes, sir; by their general appearance.

37. Are they constructed differently from ordinary traveling trunks?

A. Yes, sir.

38. And by reason of their construction you could generally distinguish the drummers' trunks?

A. Yes, sir. Sometimes you could not, but as a general thing you could. They got to charging them for extra baggage, and then they would use the other kind of trunks to get out of paying for the extra baggage and beating the road. As a general thing those that didn't get onto that used the old style.

39. Do you know of any drummer getting his trunk changed for the purpose of beating the company?

A. No, sir; I don't know of any. I heard of two or three cases.

40. Personally you don't know of any so as to swear about it from your personal knowledge?

A. No, sir; I could not swear to it. I have been shown trunks that they said were drummers' trunks that had been changed.

185 I could swear that my attention on two occasions had been called to the trunks that they said belonged to mercantile men that had been changed.

41. Was that baggage car totally consumed by fire that night?

A. Yes, sir.

42. Some trunks were destroyed, were there not?

A. Yes, sir.

43. Do you know how many?

A. I could not say for certain.

44. Several?

A. There were three or four trunks destroyed.

45. The only persons there in the baggage car at the time of the fire were the express messengers in the express end of the car?

A. That is all that I know of.

46. There was no person in the mail compartment that night?

A. No, sir.

47. Explain on that diagram that you have filed how the postal department was warmed.

A. The postal department is warmed by being between two stoves. Those two stoves are set in the partitions between the baggage car and the mail car and the express car and the mail car.

(Here follows diagram marked p. 186.)

187 48. How does the heat get through into the mail department?

A. The stoves, I think, to the best of my recollection, set half way between the two; what I mean by that is that the stoves set half way between—pretty near half way; in the centre of the partition.

49. Do you mean that part of the stove protruded into the mail department and part into the express department?

A. Yes, sir.

50. And part into the baggage department and part into the mail department?

A. Yes, sir; some stoves were cut off more than others; some protruded more than others; with some of them just the bare rim would come in. The partition came down so as to clear the stove. That was generally metal of some kind, and that would come down to the stove and stop, and that would give that much of a heating surface.

51. Where was the fuel put into the stove from?

A. From the express end of the express part of the car.

52. There was no place in the postal department for putting fuel into the stove?

A. No, sir.

53. Do you know whether there was any mail matter in that mail department on that night?

188 A. I think there was.

54. Do you know how much?

A. I don't know.

55. Was it destroyed?

A. Yes, sir.

56. Who had charge of the mail matter from Cincinnati to Louisville?

A. The baggage-master.

57. The baggage-master of the road?

A. Yes, sir.

58. When he arrived at Louisville to whom did he deliver it?

A. I don't know whether he delivered it to the general baggage-master or to the mailman. I think W. W. Dugan took charge of it, the general baggage-master.

59. Who placed those mail bags into the car before your departure from Cincinnati?

A. The mail service men; sometimes they throw them in at Cincinnati and sometimes my baggage man.

60. They are just thrown in?

A. Yes, sir.

61. Piled up?

A. No; just thrown in.

62. Is the room full of those bags?

A. I don't think I ever saw the room full, to the best of my recollection.

189 63. About how many bags were in there that night?

A. That I could not say.

64. What was there to protect those bags from those grate or stove irons on either side?

A. There was this partition coming down, and then there was bars that came down; whether that one had those bars down I could not say.

65. What is your best recollection?

A. My recollection is that the bars went down — front of the stove on each side. The partition is zinc or iron or tin or some kind of thick metal, and then there was bars that came down to the floor.

66. One or more bars?

A. Several.

67. How far from the stove?

A. Right in front; just in front; an inch or two inches.

68. The mail bags were put in there, and would they or not press up against those bars when there was much matter in there?

A. If they threw the mail bags back against it and there was much fire in the stove they would be apt to catch fire.

190 69. Do you know whether this fire originated in that way?

A. I could not say.

70. But if the bags were pressing against those iron rails and there was a fire in the stove——

A. And they made the stove red-hot it would catch fire. Of course, if there was not heat enough in the stove to set fire to anything it would be different, but if the stove was red-hot (which it evidently was then) it might have caught in that way.

Objected. Out. Not read.

71. You don't know of your own knowledge, if I understand you correctly, how the fire originated?

A. No, sir.

72. You say that there was no fire to amount to anything in the stove in the back end of the car at Worthville?

A. At Worthville it had gone very near out.

73. Was it not replenished there?

A. Not to my knowledge.

74. Do you remember whether you inspected to see how the mail bags were placed in the mail department on that night?

191 A. I did not; I opened the door and looked in to see if any one was in there and passed on through the car; that is my object—to find passengers.

Cross-examination by Mr. LINCOLN:

1. Don't you know that on that night the car which you used as a baggage car had no opening through the partition into the mail department?

A. I do not.

2. Are you certain about that—whether there was an opening from the baggage end of the car through the partition into the mail department or only one from the express part of the car into the mail department?

A. To the best of my recollection there was both.

3. But you would not want to be certain about that?

A. No, sir.

4. The charge of that is more particularly under that of the baggage man?

A. In the baggage end of the car it was.

5. I understand that you were in there several times after you left Worthville?

A. Yes, sir.

192 6. In the baggage car?

A. Yes, sir.

7. How many times?

A. Two or three times.

8. You saw the fire in that stove in the baggage end of the car each time that you were in there?

A. I didn't see any fire; I think it had gone out.

9. You say there could not have been much fire in the stove?

A. No, sir.

10. Do you know how near La Grange your train was the last time that you were in there? What is the next station?

A. The last time that I was in there I was about seven miles from La Grange.

11. Did you go at that time into the express-room or into the baggage-room?

A. Into the baggage car.

12. Where last were you in the express-room?

A. I was not in there but once after I left Cincinnati.

13. That was in the charge of the two express agents?

A. Yes, sir.

14. Not under the charge of the baggage-master?

193 A. The express agents had charge of that.

15. It was not under the charge of the baggage-master?

A. No, sir.

16. Was not Mr. Madden an attentive baggage-master?

A. Very.

16½. A good, faithful servant?

A. The best man that I ever saw on a railroad in my life.

17. I will ask you if it was not part of his duty to assist about hot boxes and about the sidings.

A. Yes, sir.

18. I will ask you what, if anything, there was on that night which might have misled the parties in that car in reference to the character of the fire at first—if there was anything connected with the train.

A. We were troubled with a hot box just after leaving Walton, I think—twenty-one miles this side of Cincinnati—and my impression is that we stopped once or twice along the road to cool the box down and put out the fire.

19. Had the baggage-master helped you?

A. Yes, sir. It was the invariable rule to summon the

194 baggage-master to help, because we wanted to expedite matters as quick as possible, and I had called on him in every instance that night to help.

20. He had assisted?

A. Yes, sir.

21. Don't you know that he had got his feet wet and had got very cold in doing it, and that he went into the smoking car to warm himself?

A. No, sir; he was in there watching the box.

22. He was there at your request watching the box?

A. Yes, sir.

23. Where was the box?

A. I think the box was on the forward end of the smoking car, if I am not mistaken; I think it was; I could tell by my report.

24. In what way would the hot box on that night deceive people about there being a fire in the train in the baggage car?

A. The smell; the smelt—the box. That is the way that we can generally tell boxes before they show. Before they blaze they will smell; in every instant; it blazes in a few minutes.

195 25. You think, then, that you were all thrown off your guard by the smell of the hot box?

A. I know that they were, because I was sitting talking to them.

26. You think all of them were thrown somewhat off their guard by the smell of that hot box?

A. All of them. As to the express men I don't know. I never saw them at all.

27. It would be smelt all through the train?

A. Yes, sir.

28. And would not that tend to disarm a person, that any smell that he smelt in his car would not he attribute it to the hot box likely?

A. Yes, sir.

29. Don't you know that Mr. Madden was a careful man about putting away his mail matter?

A. I don't know about his mail matter, but I know that he was very particular about his baggage, for I watched him. I never noticed him about the mail.

30. How was this mail carried—in these canvass bags?

196 A. Yes, sir.

31. All in canvas bags?

A. Some canvas and some leather.

32. Don't you know that these traveling agents or drummers often try to build their trunks in such a way that they will not be noticed from ordinary baggage?

A. I know of two instances in which I was told that they were drummers' trunks.

33. Don't you know that people who travel a great deal—on account of the roughness with which baggage is handled in this country—build their trunks pretty strong when they carry only ordinary baggage?

A. Yes, sir.

34. Do you remember whether on that night there were some large trunks, which were trunks belonging to a couple of bridal parties, one from Nashville and one from Russellville, I think?

A. I didn't notice any of the trunks.

35. At the time you saw the fire in the car what power had you to extinguish the fire?

A. None in the world. I lost my overcoat and my tools that I had in my chest.

197 36. Don't you know that the baggage-master lost all of his personal property, and clothing also?

A. Yes, sir.

37. You say that when he ran forward that he said: "My God, the baggage car is on fire?"

A. Yes, sir.

38. That is, as they stopped?

A. They hadn't quite stopped.

39. Was there any neglect on his part in doing whatever he could to extinguish that fire or to get out the baggage?

A. None in the world; they all went to work.

40. When you first saw the fire I understand you that it was coming out of this door on the right-hand side of the car?

A. Yes, sir.

41. That would be the right hand of the car facing Louisville?

A. Yes, sir.

42. And you saw the flame coming out of there?

A. Yes, sir.

43. Don't you think that the forward part of that car was the first consumed—the express end?

198 A. No, sir; I think the center was consumed first.

44. Was not the forward part of the car consumed before the baggage end?

A. Yes, sir; the extreme ends of the car was the last consumed.

45. But the express end was more on fire and consumed faster than the baggage end?

A. Much before.

46. Was there anything to prevent the Adams Express agent or any other agent going into that mail-room?

A. No, sir.

47. And sitting down or lying down upon the bags?

A. Nothing.

48. Had they seats in the express-room?

A. They generally carry their chair with them. I think Price always carried a chair; that is my impression.

49. Were either of them injured any?

A. Yes, sir.

50. Which one?

A. Price.

51. What part of him was injured?

A. His face and hand was burned.

52. Was not his arm burned?

52. I could not say; I saw that his face and hand was burned.

199 53. Was there anything to prevent the passage of smoke and flame along this aisle at the left of the mail-room?

A. No, sir.

54. If there had not been the smell on the train of the hot box don't you think that the men in the front part of the car would have smelled that fire and found that there was something the matter?

A. Not if they were asleep.

55. If they were awake?

A. Yes, sir.

56. You don't know whether they were asleep or awake, of your own knowledge?

A. I don't know.

57. When did you leave the service of the road?

A. On the 25th day of September, 1881.

58. Did you know Mr. Duff, on that train?

A. Yes, sir.

58. Do you know how he came to leave the service of the company?

Question objected to by counsel for the plaintiff.

A. I discharged him.

59. When was that?

Question objected to by counsel for the plaintiff.

A. I could not say when it was now.

60. Was there any manner of effort that could have been
200 effected to save that car or the baggage that was not taken?

A. None in the world.

61. Do you know now of anything that could have been done that was not done after you ascertained that there was fire there?

A. I do not.

Redirect examination by Mr. DODD:

1. You have been asked on cross-examination whether the smell arising from a hot box might not have disarmed the employees on the train. I will ask you to state whether the hot box was not in the rear of the baggage and express car.

A. Yes, sir.

2. When the train was moving in the direction, and the hot box was in the rear of the express and baggage car, would not the atmosphere or the current created by the movement of the train carry it back instead of forward?

A. It has a tendency to, but in a great many cases I have been sitting in the front part of the train and the hot box has been on the sleeper in the rear and I have smelt it.

201 3. Do you know whether there is any resemblance between the smell arising from a hot box and the smell arising from burning mail in the baggage-car?

A. The varnish smelt very much like a hot box that night.

4. Is not there more or less grease in a hot box which burns?

A. Yes, sir.

5. And that grease causes quite an odor?

A. A peculiar odor—something like turpentine.

6. You have also been asked as to the matter out of which these mail bags were made and you answered that your recollection was that they were canvas bags. I will ask you whether or not these canvas bags are not more inflam-able than the trunks and much more easy to catch on fire than the trunks?

A. Oh, yes, sir.

7. And when on fire would burn rapidly?

A. Yes, sir.

8. You have also been asked with reference to the effort to save the baggage after the fire was discovered. I will ask you now, supposing the baggage-master had been in the baggage-car,

202 would he not have detected the fire sooner than he would in the front car, necessarily?

Question objected to by counsel for the defendant.

A. Undoubtedly.

9. If he had been there in the baggage car and detected the fire sooner could he not have saved more of the baggage than was saved?

Question objected to by counsel for the defendant.

A. I could not say. It would depend entirely upon the circumstance as to when he discovered it.

10. If he had been awake and been in there would not he necessarily have discovered it, very soon after it started, from the smoke?

Ruled out; not read.

A. I should think that he would discover it right off.

Recross-examination by Mr. LINCOLN:

1. Would not you also think that a man who was in the other end of the car would discover it from the smoke?

A. Yes, sir.

2. And as his duty called him at other places, could not he rely more upon those in the front part of the car to discover anything like fire?

203 A. Yes, sir; that was their place.

3. He was awake in the car with you, watching the hot box?

A. Yes, sir.

4. And occasionally he went to the baggage-room to see that everything was all right there?

A. Yes, sir.

5. I will ask you of what a car is built ordinarily?

A. Built of oak timber.

6. That was built in the usual way and of the usual timber?

A. Yes, sir.

7. How long have you known that kind of a car to be used on the railroads of the West?

A. I expect about ten years, to my personal knowledge.

8. Ever since you have known of these cars being used the same kind of cars have been built?

A. Yes, sir.

9. There was nothing to prevent the smoke passing along this passage-way?

A. Nothing at all.

Redirect examination by Mr. DODD:

204 1. You were just asked the question whether the baggage-master could not rely somewhat upon the express messengers watching in his absence against fire in that car. I will ask you to state whether the baggage-master examined to see whether the express messengers were asleep before he went out.

A. I don't know whether he examined or not.

HAMILTON GRISWOLD.

205 Circuit Court of the United States, District of Kentucky. At Louisville.

W. B. DINSMORE, as President of Adams Express Company,

vs.

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY.

WEDNESDAY, *May* 26, 1880.

The motion of the complainant for a preliminary injunction herein, according to the prayer of the original and supplemental bill herein, having been brought on to be heard, and counsel for the respective parties having appeared and been heard, and the court, having duly considered the questions involved, does hereby order that a preliminary injunction issue herein restraining the said defendant, its agents, officers, and servants, during the pendency of this suit, from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway for the transaction of the business of the said Adams Express
206 Company and of the express business of the public confided to its care, and from interfering with any of the express matters or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter or messengers or employés from the depot, cars, and lines of said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport, in like manner as the said defendant is now doing, over its lines of railway express matter and messengers of the said Adams Express Company, and from interfering with or disturbing the business of the said Adams Express Company in any way or manner whatsoever, and from refusing to permit the Adams Express Company to continue the transaction of its said business over the lines of the defendant on the same terms, conditions, privileges, facilities, and accommodations as are or may be permitted or accorded to any other express company, or to or by the defendant itself, in the conduct of an express business over its railway lines, upon the payment by the said Adams Express Company of all
207 lawful and reasonable charges which may be properly demanded by the said defendant or paid by such other express

company or by the public to the defendant therefor, not in excess of the rates authorized by its charter, and not in excess of the rates charged to others for similar services, and not in excess of the rates charged and received by the defendant from shippers of express matter to be carried by the defendant as such; in the last case, less the reasonable cost of the accessorial service rendered off the railway lines and at the stations and on the trains of the said defendant, and with liberty to the parties to make such further application herein to the court as they may be advised is necessary to fix what is and shall be a lawful or reasonable compensation, or for any other matter growing out of the case. In the event of a dispute between the parties pending a preparation of this cause as to what is reasonable compensation for the services performed by the defendant company for complainant and what is a reasonable rebate to be allowed by
the defendant for said accessorial service, such difference
208 shall be referred to the court after due notice, and pending such reference the complainant shall not be disturbed by the defendant in the transaction of express business over its line.

A true copy.

Witness my hand and seal of said circuit court this 26th day of May, A. D. 1880.

[SEAL.] SAMUEL B. CRAIL, *Clerk*,
By HENRY F. CASSIN,
Deputy Clerk.

A.: CHAS. A. GRAHAM,
N. P., J. C.

209 STATE OF KENTUCKY, *Jefferson County:*

I, Charles A. Graham, a notary public, duly commissioned and qualified as such, in and for the county of Jefferson and State of Kentucky, do hereby certify—

That in pursuance of the annexed notice I was attended, at the law office of W. C. & J. L. Dodd, cor. Center & Green St., in the city of Louisville and county and State aforesaid, on the 3rd day of Nov., A. D. 1882, and between the hours of eight o'clock a. m. and six o'clock p. m. of said day, by W. L. Duff and Hamilton Griswold, witnesses of sound mind and lawful age, and that they were first by me carefully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth of their knowledge touching the action mentioned in the caption.

That their examinations were by me reduced to writing in their presence, read to and subscribed by them in my presence, both parties being present by attorney. I have retained said depositions in my possession for the purpose of forwarding the same
210 with my own hand to the court for which the same were taken. I further certify that I am not of counsel or attorney for either of the parties in said deposition named or related to them or in any way interested in the event of the said cause named in the caption.

In testimony whereof I have hereunto set my hand and seal this the 3rd day of November, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] CHAS. A. GRAHAM,
Notary Public, J. Co., Ky.

211 EXHIBIT G.

United States Circuit Court. February Term, 1885.

THE SWITZERLAND INS. CO., Plaintiff,

vs.

THE L., C. & L. R'WAY CO., Defendant.

JOHN COOK, called by the defendant, being duly sworn, testified as follows:

By Mr. STEPHENS:

Q. What is your business?
A. Trunk manufacturer.
Q. How long have you been engaged in the business?
A. Twenty-eight years, very near.
Q. You are of the firm of Leonard & Cook?
A. Yes, sir; formerly Cook & Vankirk.
Q. Where is your place of business?
A. No. 50 Main street.
Q. You have been a large and extensive dealer in trunks of all kinds, have you not?
A. Yes, sir; we have been manufacturing different grades of trunks and travelling equipments. Satchels, of course, we do not manufacture.
Q. You have been an extensive manufacturer?
212 A. Yes, sir; about as extensive as there is in *in* the city.
Q. Take some of these trunks that drummers sometimes use. How do the trunks which they use in their business compare with trunks which travellers may wish to use where they have them heavily built *built* for purposes of safety, resisting knocks, and things of that sort? I refer now to the outward appearance.

Question objected to by counsel for plaintiff (Mr. Matthews) on the ground that the question is too general.

COURT: There was testimony tending to prove that trunks made for the carriage of samples of jewelry were peculiar in construction and appearance and testimony that this road had carried such trunks, or at least the trunks of the witnesses, on three or four occasions upon a check without objection. There was also testimony that this road had carried drummers' trunks. That testimony the jury might infer—I don't say they are bound to infer it, but from the tenor of the testimony they might so

conclude—was based upon the appearance of those trunks.
213 Now comes this witness for the defendant, and he, being a trunk manufacturer, is asked whether there is any difference in the appearance of drummers' trunks and trunks made for use by persons who are not drummers, and it seems to me that he is a competent witness. I cannot anticipate what the answer of the witness would be, nor to what this would lead. It is enough for me to know what the question is, and that upon the testimony already in it is certainly competent for the defendant, if it is within the power of the defendant to do so, to introduce testimony that there is not any substantial difference between the appearance of drummers' trunks and the appearance of the trunks of other travellers. It certainly goes for whatever it may be worth in answer to the testimony respecting drummers' trunks that is offered on behalf of the plaintiff; so that I would overrule the objection.

Counsel for defendant (Mr. Matthews) excepted to the ruling of the court.

Ans. I would state to the jury that the outward appearance is very indefinite. In late years we have been building sample
214 trunks in similarity to the regular travelling trunks which in former years had been made a specialty. We have sold sample trunks for general use as well as for commercial men, and we have had sample trunks ordered to compare with those used by the general travelling community to make them so appear. It has been a request of the drummers to have them made in that way—to have them cut down smaller than they formerly were—so as to give them the same appearance as a general travelling trunk, and in a great many instances it would be hard to detect them by outside appearance. They would be more apt to be detected by the inside appearance of the finish.

Q. What distinguishes a drummer's trunk from the trunk of an ordinary traveller the most—the inside or the outside?

A. In a great many instances the inside, of late years.

Q. Take the last four or five years.

A. The changes in regard to the cutting down have been within the last two years or two years and a half.

Q. What do you mean by "cutting down?"

A. Making them smaller than they were in former years.
215 They use a smaller trunk now than they used to do, even for clothing and hardware, as well as jewelry.

Q. Before they were cut down how would they compare with other travelling trunks used by the community, so far as outside appearance was concerned?

Question objected to.

Q. Take trunks that are often used by the travelling community, as to outside appearance, how was it?

A. How they would look as to their general appearance?

Q. Yes, sir.

A. The difference in the shape would be the way of designating them apart. The size of the commercial trunks would be much smaller than that of the general travelling trunks. The difference would be in the size and the shape.

Q. What would be the peculiar distinction—the outside or inside?

A. In a great many instances it would be the inside.

Q. How does the inside differ in a traveller's trunk, an ordinary traveller's trunk, from that in a drummer's trunk?

A. The difference would be in the compartments. In a
216 commercial trunk there are no compartments generally, except in a jeweller's trunk. That would be full of trays. In a general travelling trunk there is usually a bonnet box, top box, glove box, &c.

Q. How would a hardware trunk compare with a jewelry trunk?

A. In size smaller, as a general thing.

Q. In outward appearance, how?

A. Similar to the jewelry trunk. It is similar, only smaller. I will state to the jury that jewelry trunks, as a general thing, are a little more rounded in the top than the hardware trunk. As a general thing the hardware trunk is made more square.

Q. Are travellers' trunks also made square sometimes?

A. Yes, sir; not so many, though. Take the steamer trunk, take what we call the European traveller's trunk, and, as a general thing, they are made more square than other trunks would be—that is, for general use. Then we make another trunk called a half-square trunk. Some people would call it square. We call it half round. The Saratoga trunk would be perfectly round.

217 Q. Take some of these trunks used by ocean travellers, how are they made as to heaviness compared with ordinary travelling trunks?

A. They are not so heavy and not so bunglesome in weight or appearance.

Q. How do these drummers' trunks, in the various trades, differ in size and build? Are they alike?

A. No, sir. The hardware trunk is the smallest used by the commercial traveller. It is the lowest. Then comes the jewelry trunk, and then the clothing men, and then the notion men. The notion men have a very large, high-built trunk; sometimes as high as 36 inches from the floor. The clothing trunk used to be from 30 to 33, and it now runs from 20 to 22. Jewellers' trunks, as near as I could guess, would be from 18 to 20 inches high; sometimes 15 to 18 inches.

Q. That is the lowest size?

A. Yes, sir.

By COURT:

Q. Is there any difference in the strength with which these trunks are made? Are any of them made stronger in pro-
218 portion than the others? For instance, how does the hardware trunk compare with the notion trunk?

A. The hardware trunk is much heavier than the notion trunk, although it is smaller. The notion trunk will carry from 250 to 300 pounds, and a much smaller hardware trunk will carry the same weight.

Q. How is it about the trays?

A. The hardware trunk has no trays. It generally has slides that slide in and out, where a jeweller's trunk has trays that they lift out.

By Mr. STEPHENS:

Q. How would you say that a jeweller's trunk would compare in size with the ordinary travelling trunk or with many travelling trunks that might be built, especially as to hight, &c., and how has it been for the last five years?

A. Very much the same as to size.

Q. As to strength, what has been the custom as to making the ordinary travelling trunk strong?

A. With regard to the difference between a sample trunk and an ordinary travelling trunk, do you mean?

219 Q. What I want to know is how often a traveller would want a trunk built strong—as strong as a sample trunk.

A. We have built a great many trunks for general travelling purposes with the same amount of strength as we would put in a jeweller's trunk.

Q. How long have you been doing that—for how many years?

A. We have done that ever since we have been in business. That kind of work would be done by special orders.

Cross-examination by Mr. MATTHEWS:

Q. Within the last two or three years you say there has been a difference between what is known as drummers' trunks or travelling salesmen's trunks and the ordinary trunks of the travelling public in these three respects—size, shape, and the clamps that you used to strengthen the trunk?

A. Excepting the public.

Q. I am drawing the distinction between the trunks of travelling commercial men and the travelling public in general. Until

220 within the last two or three years, as I understand, there has been that distinction in these three respects.

A. There has been a difference in the commercial trunks, as far as size is concerned, in the last two or three years. They have been cut down, as a general thing.

Q. Didn't you say there was a difference in the shape, too?

A. Not in the commercial trunks.

Q. Take, for instance, a jewelry trunk and the trunk of an ordinary traveller; has there not been, until within the last two or three years, a difference in the respects that I have mentioned of size, shape, and the clamps which are used in strength-ing the jewelry trunks?

A. No, sir; only in the size; the size has been cut down.

Q. What do you mean by saying there is a difference in shape, and what do you mean by saying that upon special orders you have built trunks?

A. I think there was a difference in shape between the commercial trunk and the general traveling trunk. In the general traveling trunk there is a rounding in the top, and in a great many instances it is a great deal larger, but a great many of them are
221 just the same shape that a jewelry trunk would be; they are just the same in shape and appearance from the outside, and we have a real flat trunk that we have been making for years—what we call a steamer trunk.

Q. Until these changes were made that you speak of was there not a marked difference between commercial trunks and the trunks of the ordinary travelling public?

A. There was just about the same difference that there is now, excepting that there is more difference in size. We make the same shape now that we did formerly; only the odds now are much greater in favor of the commercial men on account of the size.

By Mr. STEPHENS:

Q. Do the hardware trunks differ in size? Are they all of the same size?

A. They run very near. There is not probably more than an inch or two inches between one man and another in the same business.

Q. How as to the jeweller's trunk?

A. The same way—running from 22 to 32 inches.

Q. How is the ordinary travelling trunk?

222 A. They run from 24 up to 36, varying two inches between each size.

By COURT:

Q. How long since these drummers' trunks were first put upon the market could you distinguish them from the ordinary travelling trunk? I am speaking of trunks which bore an appearance by which they could be distinguished from the ordinary travelling trunk. How long ago were they made and sold?

A. We have made them 27 and 28 years ago.

Q. In this last three or four years do you mean to say that the manufacture of those trunks has been entirely stopped?

A. No; the sizes have been cut down to decrease the weight.

Q. What proportion of trunks that you manufacture for drummers' use are made to bear the same appearance as travelling trunks and what proportion are made so that they show in appearance that they are commercial trunks?

A. It would be the size and the shape of them?

Q. You say that in the last three or four years you erected some drummers' trunks that looked just like travelling trunks on the outside?

223 A. Yes, sir.

Q. And you have also manufactured some drummers' trunks the same way you did before? Now, what proportion did you manufacture to look like ordinary travelling trunks? Suppose you manufactured a hundred drummers' trunks, how many would be manufactured to look like ordinary traveling trunks?

A. The comparison would be in the shape. Of course, we might make a 36-inch trunk and make it the same shape we would a 28-inch trunk, which would be a drummers' trunk. The difference would be in the size. The appearance of the shape would be the same, and the only difference would be in height and width. Very often there is a difference in the covering. One man might wish to have his trunk covered with zinc, although that is done away with a great deal now on account of its liability to be taken for a jeweler's trunk. Now they have the jewelry trunks covered very often with an imitation of patent leather or canvass. That is used a
224 great deal by jewelry men now. Then we sometimes use leather for covering, and that causes them to resemble a general traveling trunk.

By Mr. STEPHENS:

Q. In former years, between a drummer's trunk and an ordinary commercial trunk, was the difference largely as to size or not?

Question objected to.

Q. What was the distinction with reference to size; was that the leading distinction between them or not?

COURT: The proper question is, What is the difference, in regard to size—what was the difference, in reference to size, between the drummer's trunk and the ordinary traveling trunk? I will put the question to the witness: State the general features in which the drummer's trunk differed from the ordinary traveling trunk.

A. As to outside appearance, as I stated before, the difference would be in the size of the trunks and the particularity of the shape of the top.

By Mr. RAMSEY:

225 Q. And the clamps?

A. The clamps are differently used on a general travelling trunk, as well as they are on a commercial trunk, in a great many instances.

By Mr. LINCOLN:

Q. I will ask you if all trunks—drummers' trunks, travellers' trunks, and all trunks—do not vary somewhat in size and outside shape and strength.

A. They do.

226 "H & I."

United States of America, State of Ohio, Hamilton Co., S. D.

THE SWITZERLAND MARINE INSURANCE COMPANY, Plaintiff,
vs.
LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD CO., Defendant.
} Case No. 3230.

Pending in the United States circuit court for the southern district of Ohio.

The above-named plaintiff will take notice that on Thursday, the 26th day of October, A. D. 1882, the defendant above named will take the depositions of Mike Madden, Hamilton Griswold, Wm. Duff, Louis Gorley, Frank Weber, Chas. W. Price, and sundry witnesses, to be used as evidence in the trial of the above cause, at the office of Lincoln, Stephens & Slattery, N. W. cor. of 3rd & Walnut streets, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

LINCOLN, STEPHENS & SLATTERY,
Attorneys for Defendant.

227 Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 24th day of October, A. D. 1882.

C. B. MATTHEWS,
Attorneys for Plaintiff.

Instructions for Taking Depositions.

1. In cases in any United States court the above notice must name each witness. In any Ohio court, if his deposition is to be used in his own behalf, the notice must specify that the witness is a party to the suit; otherwise no witness need be named.

2. Depositions to be used in any Ohio court may be taken in Ohio before a judge or clerk of the supreme or common pleas court or probate judge; before a notary public, justice of the peace, police judge, mayor or chief magistrate of any city or town, corporate, master, commissioner, or person empowered by a special commission out of Ohio; before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town, corporate, commissioner appointed
228 by the Governor of Ohio to take depositions, or any person authorized by a special commission. Depositions to be used

in any district or circuit court of the United States may be taken before any judge of any United States court, any commissioner of any United States circuit court, any clerk of any United States district or circuit court; any chancellor, justice, or judge of a supreme or superior court; any mayor or chief magistrate of a city; any judge of a county court or court of common pleas of any — of the United States, or any notary public, such officers not to be relative nor of counsel or attorney to either party, nor otherwise interested in the event of the cause.

3. The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays and legal holidays excepted, adjournments being to the day next after the Sunday or holiday, unless otherwise agreed upon.

4. When depositions are taken under an agreement follow these instructions, except only where they are modified by the agreement.

229 5. State at the beginning of the deposition of each witness that "(name the witness), of lawful age, being by me first duly cautioned and sworn, deposes and says as follows." Here write his deposition, which may be taken by stating the facts in narrative form or in reply to questions first written down. Each witness must sign and may write his own deposition.

6. Objections to any question or answer or to any part of either or to any witness should be entered by the officer taking the depositions, if either party demands it. This entry briefly states the objection and by whom it is made.

7. Letters, telegrams, etc., made part of the evidence must be lettered or numbered consecutively, attached to the deposition, and referred to therein by the witness as " Exhibit A " or " Exhibit No. 1 " (or 2, 3, etc.) or otherwise, according to the fact.

8. Adjournments, if there are any, and the beginning of the cross-examination and redirect examination should be noted by the officer at the time they occur; also any agreements concerning the depositions entered into by the parties to the suit or by their attorneys.

230 9. If taken by interrogatories and cross-interrogatories, under agreement or otherwise, these must each be put to the witness and answered, so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered. Attach the interrogatories and cross-interrogatories as received to the depositions.

10. If the depositions are to be read in an Ohio court and are taken before a mayor, notary public, or commissioner appointed as aforesaid they must be certified under his official seal. If before any of the other officers above named (a special commission excepted) and out of Ohio a certificate, under the seal of the court of the county or the great seal of the State in which the depositions are taken, must be annexed to the certificate of the officer taking the deposition that he was at the time of taking the same such officer as he represents himself to be in his certificate. This proof of official character is omitted when waived by agreement of the parties

231 at the foot of the notice. This agreement does not waive the taking them at the time and place named in the notice.

11. The notice or agreement under which the depositions are taken must be attached to the depositions.

12. The whole should be sealed up and indorsed, with the title (and number, if known) of the suit and name of officer taking the depositions and in whose behalf taken, and addressed and transmitted by said officer to the clerk of the court where the suit is pending; also indorse on the sealed side "sealed up, addressed, and transmitted by me," and sign this across the place sealed.

13. See, also, the instructions below the certificate on third page of this sheet.

EXHIBIT H.

Depositions of sundry witnesses taken before me, Wm. E. Brooks, notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notice, and at the time and place therein specified, to be read in evidence on behalf of the de-
232 fendant in an action pending in the United States circuit court for the southern district of Ohio, in which The Switzerland Marine Ins. Co. is plaintiff and The Louisville, Cincinnati and Lexington Railroad Co. is defendant, C. B. Matthews being present on behalf — plaintiff and T. D. Lincoln on behalf of defendant.

MIKE MADDEN, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

1st Question. State your name, age, residence, and occupation.

Ans. My name is Mike Madden; age, about 39; residence, Louisville, Ky.; occupation, baggage-master.

2nd Ques. In what business are you engaged, and when do you expect to leave this county and State, and how far is it to your place of residence from here?

Ans. I am a baggage-master, and expect to leave this county and State this afternoon for my home, which is at Louisville, and which is one hundred and ten miles from Cincinnati by the shortest line of travel.

233 3rd Ques. Were you on train No. 10 of the Louisville, Cincinnati and Lexington Short Line railroad on the 10th of December, 1880, when the baggage and express car was burned at or near La Grange, Ky.; if so, what was your position on the train?

Ans. I was baggage-master on that car.

4th Ques. What amount of baggage had you on that trip, and, if you had any mail matter also, what amount of mail matter had you on the car that was injured and burned?

Ans. I had ten (10) pieces of baggage; I did not have much mail; it was very light—lighter than common. We had no Eastern connection that night.

5th Ques. Please examine the annexed diagram, marked "Exhibit A," and state to what extent it is accurate or represents the car that was injured or burned.

Ans. That is a very good drawing of it. The baggage was piled on each side of the car, at point marked A & B; C is the passage-way between the baggage and express rooms, and D is the mail-room.

6 Ques. Was there any door or obstruction which closed up the express room from the baggage-room, or was it open right through?

234 Ans. It was open; the L., C. & L. messenger had a safe at the point E, but there was a passage by it that did not interfere with the passage.

7 Ques. To what extent was the baggage or the car saved, and why was not the balance of it saved? What became of the mail and all the express baggage and express goods?

Ans. There was four (4) pieces of baggage saved; we could not save the balance; we did our best to; we tried it, but the car burned up too quick; all the mail and express baggage and goods was burned.

8 Ques. What, if anything, became of your clothing and tools, and what tools had you on board the car, and where were they?

Ans. All burned up. There was a tool box, called the supply box, which we carried on the train in the baggage car. It generally sat near either door on the side of the baggage-room. There was in the box lamps, torpedoes, axes, saws, brasses, and other cans; the brasses was to be used in case of difficulty with the journals. We also carried a jack screw—chains.

9th Ques. Had the conductor anything in that car, and what became of it?

235 Ans. He had his overcoat, tickets, and supplies, which conductors generally carry in — box, which were burned.

10 Ques. Had you or not any book which gave a description of the baggage; if so, where was it and what became of it?

Ans. I had; it was in the baggage car; it was burned up.

11 Ques. Who had charge of the baggage room and the mail-room, and who had charge of the express-room, if anybody, and what connection had you with the express-room?

Ans. I had charge of the baggage and mail room. There were two messengers in the express-room, one for the Adams Express, named Chas. Price, and one for the L., C. & L. Express, named Maddox. I don't know his first name. I had nothing to do with the express-room.

12 Ques. What other duties had you at that time connected with the train besides having charge of the baggage?

Ans. We had a hot-box on the engine, and I was helping the men to carry water and cool it down. This was part of my duty, to assist and help them; whenever anything was wrong with the

236 train I was expected to assist. I also had to 'tend to opening the switch when necessary.

13 Q. How was the baggage-room kept—whether locked or otherwise—and who had any access to it beside yourself?

Ans. There was a lock to it, but all the men on the train had a key to it—I mean the conductor and brakesman.

14 Q. Which end of the car was appropriated to the baggage?

Ans. Always the rear end. The express is always in front of the baggage.

15 Q. What duties on the train had the men in charge of express baggage, bundles, taking care of that; had they any; if so, what?

Ans. They had nothing to do with the train at all except to take care of the express goods.

16 Q. What part of the car did they occupy?

Ans. The front end.

17 Q. Were you in the car when the fire was discovered; if not, where were you?

Ans. I was in the coach; I started into the car when I discovered the fire.

18 Q. Where was the fire when you discovered it?

237 Ans. I could not go in for the smoke; I got inside the door of the baggage part and could not stay in there for the smoke.

19 Q. Was there any fire or blaze in the baggage part of the car when you first went in there, and where did the fire or blaze come from when you first saw it; from what part of the car?

Ans. There was no blaze in the baggage car. The first I saw was the fire coming out of the mail-room and the express-car door.

20 Q. Had you any fire in the stove; if so, how was that fire in the stove for half an hour prior to the time you discovered the fire?

Ans. I had some fire in the stove; when I left the car I left the stove door open and threw some slack on the fire; the fire was dark on top and did not blaze out at all.

21 Q. How came you to go into the car immediately joining the baggage car; for what reason did you go there?

Ans. I was cold; I was up on the tank dipping water and I got my feet cold and wet; I was there getting water for the hot box, and I went into the coach where there was a good fire to get warm.

238 22 Ques. Where were you sitting—how near the door of the baggage car—when you were in that car?

Ans. Well, after I went in I sat in next seat to the stove; it was near the end of the car toward the baggage car; when it got too warm I sat back a seat or two; I went out at times to look around and then went back again.

23 Q. Was there a window in the car, and also in the door of your baggage car?

Ans. Yes, sir.

24 Q. When standing on the platform of the car on which you were could you or not see in through the window into the baggage portion of the car?

Ans. Yes; and I stood on the platform and looked into the baggage car about eight miles from where we discovered the car on fire, and everything was all right then.

25 Ques. What, if any, opening was there behind your stove into the mail-room—I refer to the stove in the baggage part of the car?

Ans. I think there was none; I think the partition was solid.

26 Q. How was the partition protected from the heat of the
239 stove? What, if anything, was there to protect it?

Ans. There was sheet iron right up against the partition to protect it.

27 Q. How was the mail-room heated or warmed, if at all?

Ans. It was heated from one of the stoves of the car. There was an open space back of one of the stoves, and it was heated from that room.

28 Q. Was that the express-room stove?

Ans. Yes, sir.

29 Q. What, if any, protection was there from the heat of that stove as against the partition; and what, if anything, was there to keep the mail matter from getting into that opening?

Ans. The space there where the opening was there were bars of iron projecting up to protect the mail, and from there up there was sheet iron. The partition was lined with sheet iron.

30 Q. You say there was but a small mail aboard. Where in the mail-room was that placed; what, if any, portion of it was up against that iron?

Ans. It was thrown in carelessly on the floor. There was a very small quantity of it. There was none of it up against these
240 irons, as I was careful to keep it away from them.

31 Q. When you say that it was thrown in carelessly on the floor what do you mean?

Ans. I mean it was thrown in on the floor of the mail-room—in the middle of the room.

32 Q. Do you mean thrown in promiscuously?

Ans. Yes, sir.

33 Ques. Do you remember the number of mail bags you had?

Ans. No, sir.

34 Ques. How was the mail carried; in what?

Ans. In canvass sacks; it was all in sacks; none of it loose.

Cross-examination *of* C. B. MATTHEWS:

1 X Q. Of what description were these ten pieces of baggage that you had in the baggage-room, and how many of them were saved?

Ans. I can't tell now. I can say four of them were saved. I can't tell the description.

2nd X Q. Do you recollect any sample trunks containing jewelry; and, if so, what became of them?

Ans. I can't tell what they contained. I have no recollection of their description.

3 X Q. You have no recollection, then, of any sample
241 trunks being in the baggage car that was burned that night?

Ans. No, sir; I cannot tell what baggage was burned; I can only tell there were four pieces saved and six burned.

4 X Q. That does not exactly answer the question. The question is, Have you any recollection of any sample trunks?

Ans. No, sir.

5 X Q. You know a sample trunk when you see it, didn't you, and did at that time?

Ans. Yes, sir; there are some of them very heavy and some of them you cannot tell them from any other trunk. There are some parties carries sample trunks that you cannot tell whether they are sample trunks or not.

6 X Ques. Do you mean that you can't tell whether they are sample trunks or not, or that you cannot tell their contents?

Ans. I mean that there are some drummers travel with trunks that you cannot tell whether they are sample trunks or not, and some travel with common zinc trunks.

7 X Q. You mean, then, that sometimes drummers travel without what are known as sample trunks?

Ans. Yes.

242 8 X Q. But it is a fact, is it not, that where they do have sample trunks you know from their construction that they are sample trunks?

Ans. Yes, sir.

9 X Q. What depot did you leave that night in Cincinnati and at what time?

Ans. Little Miami depot; I do not know the time exactly, but somewhere between 8 and 8½ o'clock; that was the only train that left for Louisville that night.

10 X Q. Did you handle or assist in handling the baggage that you took to Louisville from Cincinnati that night or from any point along the line before the fire?

Ans. Yes, sir.

11 X Q. How long were you in the passenger coach just back of the baggage car just previous to the fire?

Ans. Well, it was not over 10 minutes from the time I looked into the baggage car till I discovered the fire; I guess it was almost an hour from the time I quit riding in the baggage car till the fire; at the same time, I looked into the baggage car several times.

12 X Q. Was anybody sitting with you in the coach during that hour or any part of it?

Ans. I was sitting on the next seat to the conductor part

243 of the time, and we were talking about the hot box.

13 X Q. What kind of a night was it; very cold or otherwise?

Ans. It was a cold night.

14 X Q. Were the doors of the baggage-room open or closed during that hour that you were out?

Ans. Closed.

15 X Q. What kind of a stove had you in the baggage-room, and where was the baggage door?

Ans. One of these common stoves—common; the door was right in front of the stove, facing the end of the car.

16 X Q. Who was the conductor on that train and the brakemen?

Ans. Hamilton Griswold was conductor; Wm. Duff, brakeman, and Louis Gorley, brakeman.

17 X Q. In whose employ are you now and in what capacity?

Ans. I am in the employ of the Louisville and Nashville Railroad Co. as train baggage-master between Cincinnati and Louisville.

18 X Q. This is the same road, is it not, upon which the burning of that car occurred, which is now owned or leased by the Louisville and Nashville Railroad Company?

244 Ans. Yes, sir; it is the same road.

19 X Q. How long before the fire occurred had you seen Price and Maddox, the express messengers, or either of them?

Ans. Probably it might have been an hour or an hour and a quarter.

20 X Q. Maddox was the messenger of the express company operated by The Short Line Railway Co., the defendant, wasn't he?

Ans. Yes; he was messenger for the L., C. and L. Express Co.; it was called the L., C. & L. Express Co. I do not know who was operating it.

21 X Ques. State whether or not local express matter was usually carried on that train by the two express companies, and whether they had local express that night.

Ans. Did not do any local express on that train.

22 X Ques. Do you know what set the car on fire?

Ans. No, sir.

23 X Ques. Was there anybody in charge of the baggage-room during your absence or keeping watch of it?

Ans. Nobody in the baggage car at the time.

24 X Ques. Was there any Government mail agent in the Government mail-room during this trip?

245 Ans. No, sir.

25 X Ques. Have you not been in the habit of carrying on every trip or almost every trip more or less sample trunks?

Objected.

Ans. Yes, sir; plenty of them.

26 X Ques. How near was the stove in the baggage-room to this partition of the mail-room?

Ans. Maybe six or eight inches. I can't say exactly; maybe ten inches.

Re-examination:

1 Re-ex. Does a sample trunk differ from any other except that it is a little stronger built or protected?

Ans. Yes, sir; it differs in a great many —. There are different kinds of sample trunks; some canvass-covered, some sole-leather-covered, and so on; all kinds and sizes.

2 Re-ex. I think you do not understand my point. It is not a sample trunk like any other except that it is a little stronger built or protected than ordinary trunks?

(Objected to as bad.)

Ans. Yes; they are generally made stronger.

3 Re-ex. Do you or not know that people who travel a great deal, mere travellers, have trunks built strongly and strongly pro-

246 tected on account of the rough handling they get on railroads and ships?

(Objected to.)

Ans. Yes, sir.

4 Re-ex. Have you any means of telling what there is in any one of these trunks?

Ans. None at all, sir.

5 Re-ex. You say that you were connected with the baggage; did you check any of it or receive it from the baggage during that trip?

Ans. No, sir; I have nothing to do with the checking or owner of it.

6 Re-ex. Your connection with it, then, was after it had been received by the railroad and when it was loaded into the car, wasn't it?

Ans. Yes, sir.

7 Re-ex. When was it that the hot box first began to trouble you, and was that or not what caused you to first leave the baggage car and assist in that matter?

Ans. We were troubled with it all day—coming up that morning and going down that night. Yes, sir; that was what caused me to leave the baggage car at first and assist in that matter.

8 Re-ex. You have been asked about this railroad and who
247 is owner of it; do you not know that it is now owned and run by a different company from the one at the time of this fire?

Ans. Yes; I understand it is run by the Louisville and Nashville Railroad Co.

9 Re-ex. Is or not a hot box a very unusual thing on a railroad?

Ans. No; not unusual; it happens once in awhile.

Recross-examination:

1 Re-ex. When you discovered the fire did you attempt to stop the train; and, if so, how, and how many attempts did you make, and with what success?

Ans. Yes, sir; I tried to stop the train, and as soon as we got it stopped we detached the coaches. The bell cord was burned at that time. The train stopped immediately or pretty soon after.

2 Re-ex. If there was no fire in the baggage-room how did you know the bell cord was burned?

Ans. Well, I do not know, except what I heard the messenger say afterwards—that they could not ring the bell.

(T. D. Lincoln objected to the above.)

3 Re-ex. You made no attempt, then, to sound the gong; and why didn't you, for at the time you discovered the fire you
248 had not heard the messenger say that the bell rope was burned?

Ans. The fire was in front of me, and I heard the messenger calling for their lives—somebody to save them—they were burning up. No; I did not pull the bell. I saw the fire coming out of the express and mail room door and I knew that if there was a fire there there was no bell rope left. I tried to stop the train with the hand brakes.

Re-examination:

1 Re-ex. Didn't the express men say, in the same connection that you have spoken of, in answer to counsel on the other side, that they pulled the bell rope to stop the train?

(Objected to.)

Ans. Yes; they said they pulled the bell rope.

2 Re-ex. Did or not the bell rope run from the baggage part of the car through the mail-room and then the express-room, on to the engineer?

Ans. Yes, sir.

MIKE MADDEN.

(Here follows diagram marked p. 249.)

250 R. J. WACKENSHAW, of lawful age, being duly sworn, deposes and says as follows:

1 Ques. State your name, age, residence, and occupation.

Ans. My name, R. J. Wackenshaw; age, 35 years; residence, Louisville, Ky.; occupation, locomotive engineer.

2 Ques. Were you on train No. 10 Dec. 10, 1880, when a baggage and express car was burned up near La Grange, Ky.; if so, what were you doing on that train?

Ans. I was the engineer of that train; I was running the engine.

3 Ques. What, if any, notice did you get to stop the train?

Ans. By pulling the signal bell.

4 Ques. Is that attached to a rope?

Ans. A rope that leads through the train is attached to the bell.

5 Ques. How soon was the train stopped?

Ans. In about one hundred yards.

6 Ques. At the time the train was stopped what efforts were made to extinguish the fire?

Ans. The baggage car was cut loose from the coaches and
251 pulled away a proper distance so the coach would not catch fire, and then the mail car was cut loose from the baggage car; it was removed to a side track in safety.

7 Ques. You do not comprehend the question. What was done, if anything, towards trying to put out the fire of the car?

Ans. I don't know; I cannot answer that question.

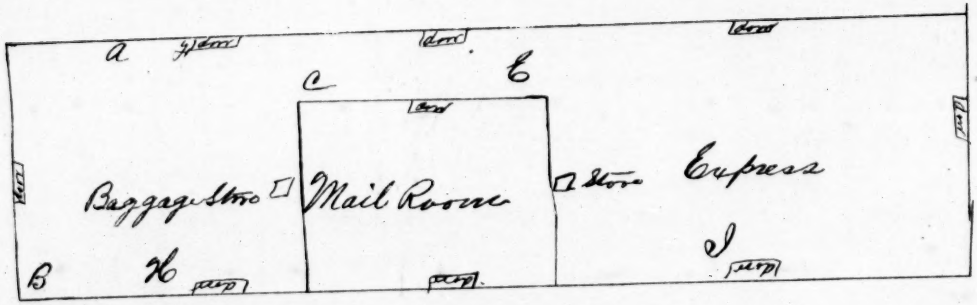
8 Ques. Do you or not know that they tried to get water from the tender to try to put out the fire?

(Objected to a- bad.)

Ans. Yes, sir.

9 Ques. Was it or not, in your opinion, possible to put out the fire or save anything except what was saved?

(Objected to.)



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Switzerland County Ice Co.
} p. 249

Exhibit A
Mike Madden's Depositions
Wm. E. Brooks
Notary Public

Ans. It was impossible to put the fire out; couldn't say anything about the saving business.

10 Ques. What! couldn't you say anything about the saving business? Is it because you do not know anything about it?

Ans. I do not know anything about it.

11 Ques. How was your train running at the time you got notice to stop?

Ans. We were running at a slower rate of speed than usual
252 on account of getting an order that freight trains would use so much of our time to make the siding, and the time was not up yet by half a minute to pass the side track.

12 Ques. Have you any personal knowledge of how the fire occurred?

Ans. None whatever.

Cross-examination:

1st Ques. In what condition was the baggage and express car when you got the signal to stop?

Ans. I do not know what condition it was in then.

2nd Ques. When did you first look at it? And state what progress the fire had made then.

Ans. The bell rang once, which is a signal to stop the train. I supposed it was a signal from the conductor to stop the train on account of being a little ahead of the time specified in the order to meet the opposing train, and almost three seconds after the bell was pulled once it was then pulled in rapid succession until the train was stopped. The firemen then looked back and told me that the mail car was on fire. I opened the window and looked back from my side and saw the smoke and flame rushing out of the
253 baggage car. The conductor and brakemen then cut the burning car loose from the coaches and pushed the burning car away from the train and then cut the mail car loose from the baggage car and put the mail car on the siding and returned to the fire in about twenty minutes from the time we left, coupled onto the burning car with the engine, and put it on the side track. This happened right at the side track, and only had to pull the burning car about six car-lengths to put it on the siding. The car was then all destroyed by fire except the bottom timbers.

3 Ques. Was the coal in the tender piled up so high that you could not see the baggage car over it?

Ans. No, sir.

4 Ques. It was right next to the engine, was it not?

Ans. No, sir.

5 Ques. What was between it and the engine?

Ans. The postal car.

6 Ques. Besides a mail compartment, then, in the baggage car there was also a postal car on the train, was there?

Ans. Yes, sir.

254 7 Ques. Out of what part of the baggage car was the flame and smoke coming when you first noticed it?

Ans. I couldn't say; the car was off a little too far for me to tell the exact location of it.

8. Ques. Was it coming out of the end nearest to you or the end farthest away from you?

Ans. I could not say; there was a small space between the two doors, and it would be difficult to tell which door it was coming out of.

Re-examined:

1st Re-ex. When you say it was about 20 minutes before you hauled the lower part of the burning car onto the side track that is a mere estimate, is it not; you did not look at you watch, did you?

Ans. It is a mere estimate; I did not time it by my watch.

R. J. WALKINSHAW.

EXHIBIT I.

L. B. GORLEY, of lawful age, being duly sworn, deposes and says as follows:

1st Ques. State your name, age, residence, and occupation and when you expect to leave the county and State.

Ans. My name is L. B. Gorley; age, 32 years; residence, 427 Gray St., Louisville, Ky.; occupation, baggage-master; I
255 might stay till Saturday, but maybe I will go down in the morning, as the notion takes me.

2 Ques. Were you on train No. 10 on Dec. 10, 1880, when the baggage and express car burnt up at or near La Grange; if so, what was your connection with the train?

Ans. I was a brakeman that night on that train?

3 Ques. In what part of the train were you when you learned that there was some trouble on the train?

Ans. I was sitting in the front part of the ladies' car alone.

4 Ques. What was the train, how many cars, and where was the ladies' car?

Ans. There were six cars on the train; the postal car, baggage car, smoking car, ladies' car, Louisville sleeper; they were in the order in which I named them, beginning at the engine.

5 Ques. Did you go forward to the baggage car; if so, how soon did you get there, and how did you get there, and what was the condition of the train when you got there—that is, whether it was entirely stopped or not?

Ans. The train slowed up, which attracted my attention.
256 I passed through the smoking car to the front platform of the smoking car and looked out on the right-hand side and saw flames bursting out the car door. I then jumped down on the ground. There was one of the postal clerks trying to cut the postal car off. I think I said to him to wait or stop. I then run to cut the train out between the smoking car and the baggage car, and there was some one helped me; I cannot tell who it was. The train had stopped when I got forward.

6 Ques. Out of which part of the baggage car was the flame or fire issuing when you first saw it?

Ans. That I can't be positive, whether it was the express-room door or the mail-room door—the two doors are right close together.

7 Ques. What, if any, fire was there in the baggage part of the car when you first went forward onto the platform of the smoker?

Ans. No, sir; there was no fire in the baggage-car room.

8 Ques. Did you look into the baggage-car room at any time, or were you in it?

257 Ans. Yes, sir.

9 Ques. Did you notice when you just looked in to the baggage car where the flame was and where it came from; if so, where did it come from?

Ans. It was coming out of the mail-room door marked G into the isle or passage-way.

10 Ques. Did you notice the stove in the baggage part; if so, how was it as to fire or otherwise; how was its door?

Ans. The stove door was open and the fire was out; no fire in the stove—at least it did not look to me like there was.

11 Ques. What light is kept in the baggage part, if any?

Ans. We were using candles at that time, but I do not think we used candles in the baggage car. I think it was a lamp—oil lamp—but will not be positive about that.

12 Ques. There was a light kept there, was there not, so you could see either candle or lamp?

Ans. Yes, sir.

13 Ques. When you used candles how did you keep them? What I want to know is whether in a globe or how?

258 Ans. It was put in a spring socket and put in a globe.

14 Ques. Which part of the baggage car was first most consumed?

Ans. The front part—express car.

Cross-examination:

1 Ques. What is your business now?

Ans. Baggage-master on the L. & N. R. R. (Louisville and Nashville R. R.).

2 Ques. Between what points do you run?

Ans. Louisville and Cincinnati.

3 Ques. On the same road, then, where the burning occurred?

Ans. Yes, sir.

4 Ques. When you reached the baggage car was not the baggage end of it full of smoke?

Ans. Yes, sir.

5 Ques. Could you see the condition of the stove through the smoke?

Ans. Not at that time.

6 Ques. At what time, then, was it that you observed the stove door open and the fire apparently out?

Ans. It was while I was in that end of the car.

7 Ques. How long was that before you became aware that the baggage or express car was on fire?

259 Ans. It was after the car was on fire. When the fire burst through into the baggage-room from the mail-room I was in the baggage-room trying to get the freight out, and it light- up the room so I could see the stove. At that time they had got the doors open, and that made a draft through and the car burnt up rapidly.

8 Ques. When you first got to the car which was on fire? The baggage end of it then was not so full of smoke that you could not go into it?

Ans. Well, I did not try to get into it then.

9 Ques. How long after you got there did you try to get into it?

Ans. I couldn't state the time; it was soon after we parted or separated the train.

10 Ques. Isn't it a fact that when you first got there the door of the baggage-room was locked?

Ans. I could not say, because I did not try the door. I think, though, that it was.

Objection.

11 Ques. What made you think so?

Ans. They were trying to get the door open; I think it was the baggage-master, Mike Madden, and one or two others; I think they had an axe or spike handle trying to burst it open.

12 Ques. Did they finally get it open?

260 Ans. Yes, sir.

13 Ques. When they did get it open did they go in and attempt to get the baggage out?

Ans. Yes, sir.

14 Ques. Did you follow them in immediately, or how long did you wait before you went in?

Ans. I assisted in carrying the baggage down from the platform onto the track; then they gave it up—they quit, and I jumped up and got into the car, and the heat was so intense I had to step out onto the platform again. I then went back the second time, and then run and jumped out the end of the car. I tried to get a piece of baggage to bring with me, but I could not do it.

15 Ques. Where was the baggage-master for a short period before you first became aware of the fire?

Ans. I did not see him. I do not know where he was at that time, that I remember of.

16 Ques. How long would it have taken to have got ten pieces of baggage out of the baggage car if you had been undisturbed by the fire and smoke?

261 Ans. The side doors are up here at F & H, and the baggage was piled up in the corners near A & B. It would take about (5) five minutes, I suppose, to get the baggage out of those side doors.

17 Ques. And if you had known that the other end of the car was on fire and that eventually the baggage-room itself would burn that time could be shortened a little bit, couldn't it?

Ans. Yes, sir—that is, ordinary baggage.

18 Ques. I am speaking of the kind of baggage that was on that particular car, if you knew what that was. Please answer with reference to that particular baggage.

Ans. That I don't know. I do not know what kind of baggage it all was.

19 Ques. How long did it take the baggageman to get into the door by means of the axe—that is, the end door; is it not that you are speaking of?

Ans. About a minute, I suppose; I could not say the exact time. It is not a very heavy door; it is a light door. I am speaking of the end door.

20 Ques. The smoke came into the baggage-room, I understand you to say, long before you observed any flames; is that correct?

262 Ans. It was a few minutes before the fire got that far. I guess it must have been ten or fifteen minutes; maybe more. I can't say the exact time.

21 Ques. You know, as a railroad man, don't you, that the tendency of the forward motion of the train would be to throw the smoke and flame in the contrary direction—that is, backwards towards the baggage-room, provided it started in the mail or express department?

Ans. Yes, sir.

22 Ques. There was no door or other obstruction, was there, in the passage-way C, between the express department and baggage-room?

Ans. There are no doors in there; no, sir; that is all open. There was some freight laying in there, but not enough to obstruct the passage—could pass through.

23 Ques. If the fire occurred through the over heating of the woodwork by the stove in the forward or express end of the car it would have smelt and smoldered for some time, would it not, before bursting into flames?

Ans. Yes, sir.

24 Ques. Do you know how the fire did catch?

263 Ans. No, sir; I mean by that I can't say.

25 Ques. Was the car completely destroyed?

Ans. Yes, sir.

26 Ques. At the time you got there first and observed the car was on fire can you say whether the mail or express room was the more on fire or burnt?

Ans. No; I couldn't say.

27 Ques. Did you observe the express-room at all?

Ans. I did after we separated the train.

28 Ques. Who separated this car from the passenger coaches in the rear?

Ans. I assisted myself; the other brakeman and the conductor; there were several other- assisting; I don't remember who.

29 Ques. Did you at any time during the conflagration observe the condition of the stove in the other part of that car, to wit, the express-room?

Ans. No, sir.

Re-examination:

1 Re-ex. From the time you got forward and during the time the smoking car and the rest of the train was being detached from the baggage car there was considerable confusion and activity, was there not?

(Question objected to.)

264 Ans. Yes, sir.

2 Re-ex. Did you take any note of the time and examine your watch to see how long it took to get the baggage car separated from the other?

Ans. No, sir.

3 Re-ex. When you speak of ten or fifteen minutes in your cross-examination that is a mere estimate or guess, is it not, without any examination of a watch?

Ans. Yes, sir.

4 Re-ex. The side doors of the baggage part of the car—were they fastened or not; and, if so, how were they fastened?

Ans. They were fastened with an iron pin attached to a chain which you pass through a hole from the inside of the car.

5 Re-ex. Were they at any time opened; how was the baggage got out that you did get out?

Ans. Neither of the side doors of the baggage-room were opened. The messenger pushed the door marked I on Exhibit A open and jumped out. The baggage we got out was taken out of the end door.

265 6 Re-ex. Did you not get out all which the smoke and heat would permit you to get out?

Ans. Yes, sir.

L. B. GORLEY.

266 THE STATE OF OHIO, }
Hamilton County, } *ss:*

—, Wm. E. Brooks, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Mike Madden, R. J. Wackenshaw, and L. R. Gorley were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed, as above set forth, were reduced to writing by me in their presence and were subscribed by the said witnesses respectively in my presence; that said deposition was taken at the time and place specified in the notice hereto attached, and that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit, and that said witness lives more than one hundred miles from the place of trial of said cause.

In testimony whereof I have hereunto set my hand and official seal this 27th day of October, A. D. 1882.

[SEAL.] WM. E. BROOKS,
Notary Public, Hamilton Co., Ohio.

267 1. Here name all the witnesses whose depositions have been taken.

2. The attorneys or others may write the questions. The answers in Ohio cases must be written either by the officer taking the depositions in the presence of the witness, by the witness in presence of the officer, or by some disinterested person in presence of said officer and of the witness; in United States cases by said officer or by the witness in the officer's presence, and by no other person, and the officer must certify accordingly. Therefore write here, "Myself, in the presence of the witness," or "Myself, in presence of the witnesses, respectively;" or "Said witness in my presence;" or "Said witnesses, respectively, in my presence;" or "C D, who is not interested in the suit, in my presence and in presence of the witness" (or "witnesses, respectively"), or otherwise, according to the facts, if a part were written by the officer and a part by other authorized persons.

3. If the deposition is to be used in any United States district or circuit court the certificate must also state the reasons for taking the depositions, as that the witness lives more than a hun-
268 dred miles from the place of trial; that he is bound on a voyage to sea; that he is ancient and infirm, etc. In such case add here, "I further certify that," etc., as required.

Costs.

In Ohio cases.—The officer taking the depositions is entitled to the fees set forth in the cost bill below.

In the United States.—United States commissioners and notaries public are entitled to 10 cents for each oath administered, 20 cts. for each one hundred words (each figure being counted one word) in depositions and certificates, and 25 cents for each subpœna. In United States cases witnesses are entitled to $1.50 a day and mileage as below. The depositions may be retained by the officer taking them till these costs are paid.

Cost Bill.

Writing and certifying depositions at 20 cents per 100 words	$18 40
Subpœna of witnesses, 50 cents	
Swearing witnesses, 4 cents each	
Clerk's certificate & stamp	
Postage and other necessary expenses (act'l cost)	
Attachment of witness, 50 cents each	
Commitment of witness, 50 cents each	

269 *Constable's Fees.*

Service of subpœna	
Mileage on subpœna	

Witness Fees.

(At 75 cents per day and 5 cents traveling fees each way, if not less than one mile.)

Mike Madden	$12 50
R. J. Wackenshaw	12 50
L. B. Gorley	12 50
Total costs of taking depositions	$18 40

Received of Lincoln, Stephens & Slattery the sum of $18.40 in full of my fees, as above specified. The witnesses were paid their fees by the defendants.

[SEAL.] WM. E. BROOKS,
Notary Public.

270 "J."

Notice.

STATE OF OHIO, *Hamilton County,* } ss:

SWITZERLAND MARINE INSURANCE CO., Plaintiff,
vs.
LOUISVILLE, CIN'TI AND LEXINGTON R. R. CO., Defendant. } Case No. 3230.

Pending in the U. S. circuit court for the S. dist. of Ohio.

The above-named defendant will take notice that on Friday, the 29th day of September, A. D. 1882, the plaintiff above named will take the depositions of J. S. Maddox — sundry witnesses, to be used as evidence in the trial of the above cause, at the office of W. O. and J. L. Dodd, in the city of Louisville, S. W. cor. 4th Ave. and Kentucky, in the county of Jefferson, in the State of Kentucky, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

RAMSEY & MATTHEWS,
Attorney for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

271 Done this 22nd day of September, A. D. 1882.

LINCOLN, STEPHENS AND SLATTERY,
Attorneys for Defendant.

Instructions for Taking Depositions.

1. In cases in any United States court the above notice must name each witness. I- any Ohio court, if his deposition is to be used in his own behalf, the notice must specify that the witness is a party to the suit; otherwise no witness need be named.

2. Depositions to be used in any Ohio court may be taken, in Ohio, before a judge or clerk of the supreme or common pleas court or probate judge; before a notary public, justice of the peace, police judge, mayor, or chief magistrate of any city or town corporate, master commissioner, or person empowered by a special commission; out of Ohio, before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, commissioner appointed by the Governor of Ohio to take depositions, or any person authorized by a special commission. Depositions to be used in any district or circuit court of the United States may be taken before any judge
272 of any United States court; any commissioner of any United States circuit court; any clerk of any United States district or circuit court; any chancellor, justice, or judge of a supreme or superior court; any mayor or chief magistrate of a city; any judge of a county court or court of common pleas of any of the United States, or any notary public; such officer not to be a relative nor of counsel or attorney to either party nor otherwise interested in the event of the cause.

3. The depositions must be commenced on the day named and some portion of a deposition taken on each successive day, Sundays and legal holidays excepted, adjournments being to the day next after the Sunday or holiday, unless otherwise agreed upon.

4. When depositions are taken under agreement follow these instructions, except only where they are modified by the agreement.

5. State at the beginning of the deposition of each witness that, "(name of witness), of lawful age, being by me first duly cautioned and sworn, deposes and says as follows." Here write his deposition, which may be taken by stating the facts in narrative form or in reply to questions first written down. Each witness must sign and may write his own deposition.

6. Objections to any question or answer, or to any part of
273 either, or to any witness, should be entered by *by* the officer taking the depositions if either party demands it. This entry briefly states the objection and by whom it is made.

7. Letters, telegrams, etc., made part of the evidence must be lettered or numbered consecutively, attached to the deposition, and referred to therein by the witnesses as "Exhibit A" or "Exhibit No. 1" (or 2, 3, etc.) or otherwise, according to the fact.

8. Adjournments, if there are any, and the beginning of the cross-examination and redirect examination should be noted by the officer at the time they occur; also any agreements concerning the depositions entered into by the parties to the suit or by their attorneys.

9. If taken by interrogatories and cross-interrogatories, under agreement or otherwise, these must each be put to the witness and answered

so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered. Attach the interrogatories and cross-interrogatories, as received, to the depositions.

10. If the depositions are to be read in an Ohio court and are taken before a mayor, notary public, or commissioner appointed as aforesaid they must be certified under his official seal; if before any of the other officers above named (a special commission ex-
274 cepted), and out of Ohio, a certificate, under the seal of the court of the county or the great seal of the State in which the depositions are taken, must be annexed to the certificate of the officer taking the deposition that he was, at the time of taking the same, such officer as he represents himself to be in his certificate. This proof of official character is omitted when waived by agreement of the parties at the foot of the notice. This agreement does not waive the taking them at the time and place named in the notice.

11. The notice or agreement under which the depositions are taken must be attached to the depositions.

12. The whole should be sealed up and indorsed, with the title (and number, if known) of the suit and name of officer taking the depositions and in whose behalf taken, and addressed and transmitted by — me, and sign this across the place sealed.

13. See also the instructions below the certificate, on third page of this sheet.

275 EXHIBIT J.

The United States Circuit Court for the Southern District of Ohio.

Deposition of J. S. MADDOX, who, being duly sworn, deposes as follows:

Examination by W. O. DODD:

Int. 1. State your name, age, residence, and occupation.

Ans. J. S. Maddox; I am about 36 years of age; I live in Louisville, Ky.; my occupation is merchandising.

2. How far do you reside from the city of Cincinnati, where this cause is pending?

Ans. It is about 107 miles, I think.

3. Are you willing to voluntarily go to Cincinnati to testify in the trial of this case?

Ans. I am not.

4. Were you at any time in the employ of the L., C. & L. R'way Co. in any capacity? If so, state when and in what capacity.

Ans. Well, our company was called the L., C. & L. Express Co. I was in the employ of the express Co. Whether I was in the employ of the railroad company I don't know.

5. You say you were employed by the L., C. and L. Company Express?

276 Ans. The express Co.; yes, sir.

6. What duties did you perform while in the employ of that company?

Ans. Well, I had charge of all the goods shipped by express—the goods that were placed in the express car. I had charge of the money and freight.

7. Between what points?

Ans. Between Cincinnati and Louisville.

8. Was there any other express Co. over that line of railway?

Ans. The Adams Express Company.

9. Did the L., C. and L. and the Adams Express Companies occupy the same car?

Ans. Yes, sir.

10. The same end of the car?

Ans. Yes, sir; the same end of the car.

11. Were you in the employ of that company—the L., C. and L. Ex. Co.?

Ans. The Railway Company's Express, I think, was the name.

12. Were you in the employ of that Co. at the time of the burning of the car near La Grange, Ky.?

Ans. Yes, sir.

13. When was that?

Ans. It was in the month of December; I can't tell the year just now.

277 14. Was it last Dec. or the year before, or either?

Ans. I think it was the Dec. before; certainly not last Dec., or, perhaps, the year before that. I cannot remember it now, certainly.

15. Was the burning of that car at night or in the daytime?

Ans. At night.

16. What time of the night?

Ans. 12 or 1 o'clock—somewhere there—is my recollection.

17. Were you in the car at the time the fire occurred?

Ans. Yes, sir.

18. Were you in the front or rear end of the car?

Ans. I was in the front of the car. The express and baggage car were one, you know.

19. Was that car or not divided into compartments?

Ans. Yes, sir; it had a compartment in the middle called the mail-room, in which the U. S. mail was carried. I can make a diagram of it in a moment, which will show you the arrangement of the car.

20. Please make such a diagram and make it a part of your deposition?

278 Ans. I do so, and file it, marked Exhibit U.

21. On the night of the burning of the car was the express matter in the front or in the rear end of the car, as shown by your drawing?

Ans. We always carried the express goods in the front end, but when we were crowded we would put some back in the rear. The express goods were carried in the front end of the car.

22. Were you a messenger at the time of the burning of the L., C. and L. Express?

Ans. Yes, sir.

23. Who was the messenger of the Adams Express on that night, if any one?

Ans. A man named Price.

24. Were you and Price both in the express end of the car at the time of the fire?

Ans. Yes, sir.

25. Who, if any one, was in charge of the baggage end of the car that night?

Ans. Well, the baggage-master was Mike something. We change at different times on the road, and we had different baggage-masters. I know his name was Mike, and I know him well by sight, but I can't call his last name. That man had charge of the baggage.

279 26. Was the car in motion or standing still when you first discovered the fire?

Ans. It was in motion—running.

27. At what point on the line of the railway?

Ans. It was near Pendleton, between Sulphur and La Grange.

28. Who first discovered the fire?

Ans. I do not know whether I discovered it first or not. I don't know that any one discovered it before I did.

29. When did you first see the fire?

Ans. Well, we have a packing chest in there, and I was sitting on the end of that chest. This diagram is not drawn exactly right, but from where I was I could not see into the baggage-room. I had my back towards the mail-room. I finally became convinced that there was fire somewhere from smelling it so distinctly. I got off the chest and started back; I saw the baggage car burning—full of fire. My seat was about at the point marked "A" on the diagram. I thought at the time that the fire was in the baggage car, and I started to go back, and just as I reached to get the safe the fire

280 was blowing out of the mail-room door (at the point marked "B" on the diagram), and it strangled me so that I became frightened and I beat a retreat. I then rang the bell to stop the train. I thought that was the best thing to do. I rang it several times—we were going pretty fast at the time—but I could not get any response. I then made for this door ("C" on the diagram). I had considerable difficulty in getting it open. It is kept closed with an iron bolt, and I had considerable difficulty in getting it out. I called several times. I was somewhat frightened, and then I rang the bell again. This man Price was very much alarmed at the time, and both of us were ringing the bell and halloaing as long as we could stay. That occupied some little time. The flames were going along the roof and the smoke was filling up our car very rapidly, so that I could hardly breathe until I got that door open. However, I finally succeeded in opening it. I was burned here on the hand from holding the bars of the door. It seemed to me we ran fully a mile before we succeeded in stopping the train by

281 ringing and halloaing as long as we could. The postal car was in front of this one, and I succeeded in attracting the attention of some of the postal clerks, and they looked out of the win-

dows and saw the fire and they signalled in some way to the engineer to stop, and then the train was stopped.

30. How much fire was there in the baggage-room when you first looked in there?

Ans. Well, it seemed to me to be full of fire; the flames seemed to be running in all directions all over the roof; the car was full of fire and smoke.

31. Could you go through the baggage car at that time?

Ans. I would not have attempted it.

32. Where was the baggage-master; was he in there, in the baggage car?

Ans. Well, I did not know at that time, but I know since that he was not.

33. Could he have lived in the baggage car when you saw the fire?

Ans. No, sir; he was not in the car. I can answer that.

34. Was there any stove in the end of the car?

Ans. Yes, sir; my diagram shows where the stove was.

282 There were two stoves, one in the baggage end of the car and one in the express end.

35. Was it a warm or cold night?

Ans. It was a pretty cold night.

37. Did you have fires in the stove- that night?

Ans. We had fire in one stove.

38. Was that a regular passenger train you were on?

Ans. Yes, sir.

39. Was the baggage and express car next to the engine or not?

Ans. No, sir; the postal car was next to the engine.

40. And then the express and baggage car next?

Ans. Yes, sir.

41. What was next to the baggage car?

Ans. The passenger coaches.

42. What was the result of that fire; did it burn up any of the cars or not?

Ans. This car was burned up entirely.

43. That is, the car you were on?

Ans. Yes, sir; the express car.

44. Was there any baggage saved that you know of?

Ans. My recollection is that there were 2 or 3 pieces saved.

45. Was there any express matter saved?

Ans. I think about one package, and it was in the Adams Express Co. chest; that is my recollection. The balance was a complete loss.

283 46. Do you know how that fire originated?

Ans. I do not.

47. Were the doors of the baggage and express car open or closed?

Ans. They were closed.

48. How long after the train was stopped before the car was consumed?

Ans. Well, I suppose it burned fully an hour. That is my recollection of it.

49. Was it possible after the train was stopped, by the exercise of reasonable care and prudence, to have saved any of the baggage?

Ans. These pieces that were saved were saved after the cars were stopped. I remember seeing them thrown out of the car door by one of the baggage men.

50. How did it happen that the remainder of the train was not burned?

Ans. They uncoupled the cars from the remainder of the train and pulled it up to the switch above La Grange and switched it off on the side track.

51. Who was the conductor of the train?

Ans. Well, I have been trying to remember his name, but I cannot do it, though I know him well.

52. Wasn't it Mr. Griswold?

284 Ans. That is the name; yes, sir.

53. Do you remember who any of the brakemen were?

Ans. Will. Duff was one of the brakemen; the name of the other I do not remember.

54. Do you remember who the engineer was?

Ans. I do not.

55. You had nothing to do with the baggage in the baggage end of the car?

Ans. Nothing whatever.

56. Did you remain after that time in the employ of the express Co.?

Ans. For some time—until I resigned.

57. Do you remember how long?

Ans. About a month, perhaps.

(Signed) J. S. MADDOX.

Taken before—

[SEAL.] S. McPHERSON,

Notary Public, Jefferson County, Ky., Oct. 2nd, 1882.

(Copy.)

285 And afterward, to wit, on the 22d day of April, in the year last aforesaid, came the said defendant aforesaid, by its attorneys aforesaid, and filed in the said the clerk's office of the court aforesaid in this cause its certain cost bond, and which said cost bond so as aforesaid filed is clothed in the words and figures as follows, to wit:

Cost Bond.

Circuit Court of the United States, Southern District of Ohio.

THE SWITZERLAND MARINE INSURANCE COMPANY

vs.

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY.

Know all men by these presents that we, the Louisville, Cincinnati and Lexington Railway Company, as principal, and William

Means, are held and firmly bound unto the Switzerland Marine Insurance Company in the sum of five hundred dollars, to be paid to the said The Switzerland Marine Insurance Company, its assigns or successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 21st day of April, 1885.

286 Whereas the above-named The Louisville, Cincinnati and Lexington Railway Company has taken out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Louisville, Cincinnati and Lexington Railway Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

WILLIAM MEANS. [SEAL.]

Sealed and delivered in presence of—
ROB'T C. GEORGE.
C. W. RATTERMANN.

The above security is approved.

GEORGE R. SAGE,
District Judge of the United States, S. D. Ohio.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, William Means, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Green, in said district.

WILLIAM MEANS.

287 Sworn to before me the 21st day of April, 1885.
[L. S.] ROBERT C. GEORGE,
Deputy Clerk U. S. Circuit Court, S. D. O.

And afterward, to wit, on the day and year last aforesaid, there was issued out of the said the clerk's office of the court aforesaid in this cause our certain writ of error, and which said writ of error so as aforesaid issued is hereto annexed following, viz:

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before

you. between the Switzerland Marine Insurance Company and the Louisville, Cincinnati and Lexington Railway Company, a manifest error hath happened, to the great damage of the said The Louisville, Cincinnati and Lexington Railway Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22d day of April, 1885, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

288 And afterward, to wit, on the day and year last aforesaid there was issued out of the said the clerk's office of the court aforesaid in this cause our certain citation, and which said citation so as aforesaid issued, with the return of the marshal endorsed thereon, is hereto annexed following, viz:

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To the Switzerland Marine Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The Louisville, Cincinnati and Lexington Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 22d day of April, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEORGE R. SAGE,
District Judge S. D. O., Sitting and Holding the Circuit Court for said District, no Circuit Judge or Circuit Justice being Present.

Service accepted and appearance entered for defendant in error. Ap'l 24, '85.

C. B. MATTHEWS,
Att'y for Def't in Error.

Service	2 00
Copy	50
1 mile	06
	2 56

Served by copy as above.

LOT WRIGHT,
U. S. M., S. D. O.,
By D. M. TOWER, *Dep.*

289 And afterward, to wit, on the 24th day of June, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 137.

THE SWITZERLAND INSURANCE COMPANY
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON R. R. Co. } Chancery, 3230.

In this case, judgment having been rendered on the 28th day of February last, at the February term of said court, in the sum of $6,172.24, with interest from February 3rd, and costs, and a bill of exceptions having been taken and a writ of error allowed to the Supreme Court of the United States, but no bond having been given in time for a supersedeas, it is now, on application to me, one of the judges of the said circuit court, ordered that the defendant above be permitted to give a supersedeas bond, with good security, in the sum of $10,000, within fifteen days; and the said defendant offering William Means as security on said supersedeas bond he is approved.

(Signed) STANLEY MATTHEWS,
Associate Justice Supreme Court.

290 And thereupon, to wit, on the day and year last aforesaid, came the said defendant herein aforesaid, by its said attorneys aforesaid, and filed in the clerk's office of the court aforesaid in this cause its certain supersedeas bond, and which said supersedeas bond so as aforesaid filed is clothed in the words and figures as follows, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division thereof.

THE SWITZERLAND MARINE INSURANCE COMPANY, Pl'ff,
vs.
THE LOUISVILLE, LEXINGTON & CINCINNATI R. R. Co., Def't. } No. —.

Know all men by these presents that we, the Louisville, Lexington and Cincinnati Railroad Company, as principal, J. H. Lindenberger, of Louisville, Kentucky, and William Means, of Cincinnati, Ohio, as sureties, are held and firmly bound unto the Switzerland Marine Insurance Company in the sum of ten thousand dollars, to be paid to the said Switzerland Marine Insurance Company or its successor; to which payment, well and truly — made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 20th day of June, 1885.

Whereas the Switzerland Marine Insurance Company, a
291 corporation under the laws of Switzerland, did, on the 28th day of February last, obtain a judgment in the said court, at its February term thereof, 1885, in the sum of six thousand one hundred seventy-two and $\frac{24}{100}$ (6,172.24) dollars, with interest from the third day of February last, with costs, against the said The Louisville, Lexington and Cincinnati Railroad Company, a corporation under the laws of Kentucky; and

Whereas the said The Louisville, Lexington and Cincinnati Railroad Company has sued out a writ of error in said cause to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such that if the above-named The Louisville, Lexington and Cincinnati Railroad Company shall prosecute said writ of error to effect and answer and pay said judgment and costs, with interest, etc., if the said judgment shall be affirmed, and shall perform any judgment the said Supreme Court shall render on such writ of error, then this obligation to be void; otherwise to remain in full force and virtue.

LOUISVILLE, CINCINNATI & LEXINGTON RAILROAD CO.,
By M. H. SMITH, *President.*
J. H. LINDENBERGER. [SEAL.]
WILLIAM MEANS. [SEAL.]

Sealed and delivered in presence of—
R. K. WARREN.
BRENT ARNOLD.

292 The above security approved, to operate as a supersedeas.

STANLEY MATTHEWS.
Judge of the Supreme Court of the U. S.

Attest:

[Seal Louisville and Nashville Railroad Co., Incorporated 1850.]

R. K. WARREN, *Secretary.*

293 UNITED STATES OF AMERICA, *Southern District of Ohio:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the foregoing is a full, complete, and correct transcript of the record and proceeding- of said court in the cause therein mentioned as the same remains of record and on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Cincinnati, this — day of September, A. D. 1885, and in the one hundred and tenth year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By C. R. NEVIN, *Deputy.*

294 *Assignment of Errors.*

The Supreme Court of the United States.

THE LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO.

vs.

THE SWITZERLAND MARINE INSURANCE COMPANY, Def't.

And now comes The Louisville, Cincinnati and Lexington Railroad Company, plaintiff in error, by T. D. Lincoln, its attorney, and says that there was error in the proceedings and judgment of the circuit court of the United States for the southern district of Ohio, western division, in the said cause in this, to wit:

First. The court erred in setting aside the entry transferring the case to the chancery docket and compelling the defendant to try the case before a jury.

Second. That the court erred in permitting evidence to go before the jury objected to by the plaintiff in error, then defendant.

Third. That the court erred in excluding evidence offered by the plaintiff in error, then defendant, which was offered by the plaintiff.

Fourth. That the court erred in refusing to charge the jury that upon the evidence the plaintiff could not recover.

295 Fifth. The court erred in its general charge to the jury in the matters excepted to by the plaintiff in error, then defendant.

Sixth. That the court erred in refusing to charge the jury as requested by the plaintiff in error, then defendant.

Seventh. That the court erred in entering judgment upon the verdict and special findings against the plaintiff in error, then defendant.

Eighth. That there are other errors in the proceedings and judgment of said court in said case predudicial to the rights of the plaintiff in error.

T. D. LINCOLN,
Counsel for Plaintiff in Error.

[Endorsed:] Assignment of errors. L., C. & L. R. R. Co. *vs.* The Switzerland Ins. Co.

296 [Endorsed:] The Supreme Court of the United States. The Louisville, Cincinnati & Lexington R. R. Co. *vs.* The Switzerland Marine Insurance Co. Assignment of errors.

Endorsed on cover: S. Ohio C. C. U. S. No. 382. The Louisville, Cincinnati & Lexington Railway Company, plaintiff in error, *vs.* The Switzerland Marine Insurance Company. Filed October 12, 1885.

Supreme Court of the United States,

OCTOBER TERM, 1888.

The Louisville, Cincinnati and Lexington Railway Company,

PLAINTIFF IN ERROR,

VS.

The Switzerland Marine Insurance Co.,

DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division.

This suit was brought by the defendant in error to recover of the plaintiff in error the sum of $5,847-79, the value of traveler's trunk containing watches and jewelry, which was greatly injured by the burning of the baggage car, belonging to the plaintiff in error, near LaGrange, Kentucky, on or about the 10th of December, 1880. The jewelry belonged to Aiken, Lambert & Company, of New York. It was contained in an ordinary size trunk in the possession of one C. G. McGrew, a traveling agent, or drummer, of that house. He had no interest whatever in the property. *Pr. Rec.*, p. 49. He purchased a first class passage ticket, which entitled him to ride from Cincinnati to Louisville with his ordi-

nary baggage. He delivered the trunk to the driver of the Omnibus Co., at Cincinnati, *as his baggage and at his hotel*, who checked it with a small valise or satchel containing his necessary clothing and the conveniences of a traveler. He received checks for the trunk and his valise, but no freight or compensation was paid for the carriage of the trunk containing the jewelry, and neither the railroad company or any of its agents had any knowledge of what its contents were or that it contained anything but baggage, or that McGrew did not own it.

This property was insured by the defendant in error for Aiken, Lambert & Co., and upon due proof of the loss thereof defendant in error paid the loss, received an assignment from Aiken, Lambert & Company of their claim against the plaintiff in error. McGrew handed Aiken, Lambert & Company his baggage checks, but he made no assignment of any right of action he might have had, if any, against the plaintiff in error, to Aiken, Lambert & Company, or to the Switzerland Insurance Company.

Payment being refused, the Switzerland Insurance Company brought suit for the loss in the Superior Court of Cincinnati. The case was removed to the Circuit Court of the United States, for the Southern District of Ohio, Western Division.

As to the above facts there was no contention.

The Switzerland Insurance Company claimed that the fire was caused by the carelessness of the railroad company, and that there was want of care in not ex-

tinguishing it and in not saving the trunk in question. It was contended that the officers of the train should have discovered the fire before it got under such headway, from the offensive smell which the fire would cause; but it was in evidence that they had been troubled with a hot box for some time before the fire, which caused a bad odor, and that for this reason they did not sooner discover the fire. *Pr. Rec.*, p. 77.

The plaintiff in error contends that McGrew, even, could not have recovered for the loss of the watches and other jewelry, had it been his, and for a stronger reason that they were not liable to Aiken, Lambert & Company, with whom they had no contract whatsoever. The Court, however, charged the jury, in substance, that if it was customary for the defendants to carry the trunks of drummers without compensation, they were liable to the plaintiff, and that it was immaterial that McGrew did not own the goods.

They also charged the jury that the railroad company were liable to the plaintiffs if there was gross carelessness in the management of the train, in causing or not discovering the fire in due time, or in not extinguishing it and saving the trunk containing the merchandise.

In endeavoring to prove the custom and want of care, exceptions were taken to portions of the evidence, which will be copied, as these questions are presented herein.

The plaintiff below, among other things, contended that there was want of care and gross neglect in the express agents, who occupied the part of the baggage car set apart for their use. This consisted in the fact

that neither the baggage man on the train or the express agent had discovered the fire until it had progressed so far as that it could not be extinguished.

The baggage car was constructed in three compartments, connected by a passage way along the side, one in the hind end, next the passenger car, being for the baggage, in which the trunk in question was placed with the other baggage. Next to this room was another room for the mail matter, and still further forward was a compartment for the express goods. *Pr. Rec.*, p. 70.

In this latter room the Adams Express Company had an agent in charge of its express packages. The plaintiff in error also had an agent there in charge of other express packages. In this room the fire originated.

There was a stove between the baggage compartment and that constructed for the mail matter, in which, at the time, the fire had gone down. There was also a stove between the express room and the mail room, fed from the express compartment.

The night was cold, and it was contended that the express agent had built his fire and gone to sleep. This was alleged to be the neglect, and from the evidence it is difficult to allege any other.

Prior to this time, the Circuit Court of the United States, by Judge Baxter, had issued an injunction against the railroad company, forbidding them or any of their agents from interfering with or in any manner disturbing the Adams Express Company in the transaction of their business over all their lines of road, and from excluding or rejecting any of their express messengers,

or from refusing to transport them upon the trains. *Pr. Rec.*, pp. 81, 82.

There was proof that the baggage master was not in his compartment, but was in the car behind it and adjoining it and near it, warming himself, he having got wet in taking care of the hot box with which they had been troubled, that being a part of his duty; that he had but a few minutes before stepped across the platform, opened the door of the baggage department, to see that all was safe. There was no fair evidence of gross fault or neglect, or of any other neglect than that of the express agents before alluded to.

So clear was this that the Court set aside the special finding of the jury as to gross neglect. Nor, except from the presumptions arising from the fire and the injury to the agent of the Adams Express Company from the fire, for whose want of care it was contended the railroad company was responsible, notwithstanding Judge Baxter's order, was there any fair proof of neglect, under the circumstances. The baggage master had nothing to do with the express department (*Pr. Rec.*, p. 92), and except from the hot box and the attention which that required from him, it is probable that the fire would have been discovered before it got under headway. The baggage master was awake and within a few feet of the baggage room when not engaged with the hot box. *Pr. Rec.*, p. 93.

The case must therefore stand upon the finding of the want of ordinary care, or upon the custom, found by the jury, of the defendants to carry trunks of drummers

for persons not passengers or connected with the train, containing merchandise, as baggage, without other compensation than that paid for the passage ticket of the agent.

The proof was, in my opinion, wholly insufficient to establish such custom, and there are questions raised as to the admission of some of the evidence relating thereto.

The case, under this charge, will, however, be considered upon the theory that there was want of ordinary care, either in reference to the fire or to the efforts to save the trunk in question, and upon the custom.

The Court overruled several special charges asked, to which exceptions were taken, and gave a long general charge touching the custom, the right of the plaintiff below to recover—to portions of which exceptions were taken.

The pleadings were such as fairly to raise the question of the liability of the plaintiff in error for this loss, thus presented.

Besides submitting the case to the jury under its charge upon the general liability, the Court, upon its own motion, requested the jury to make the following special findings, which they did, as follows:

Ques. 1. "What was the value of the contents of the trunk destroyed after deducting salvage?"

Ans. "$4,955.75."

Ques. 2 "Did the checking agent have notice when he checked the trunk that it contained jewelry, or property other than the personal baggage of McGrew?"

Ans. "No."

Ques. 3. "At the time of the checking of the trunk and prior thereto, was it the custom of the defendant to carry as baggage and without extra charge, excepting on account of extra weight, drummers' trunks containing merchandise, knowing that they were drummers' trunks, and that they contained merchandise?"

Ans. "Yes."

Ques. 4. "Was the loss of said trunk occasioned by the gross negligence of the defendant?"

Ans. "Yes."

Ques. 5. "Did the defendant exercise ordinary care as to the trunk which, with its contents, was lost—that is such care as a prudent man would exercise in like circumstances with reference to his own property?"

Ans. "No." *Pr. Rec*, p. 21.

On motion for a new trial, the Court set aside Ans. No. 4 as to gross neglect. *Pr. Rec.*, p. 22.

So that when the judgment was entered the question rested upon the custom stated in special finding No. 3 on the general charge, and upon the want of ordinary care presented in special question 5.

The judgment of the Court was for $6,172.24

I maintain that, upon the facts thus proven, the plaintiff was not entitled to a verdict, and that the Court should have charged the jury that the verdict must be for the defendants.

It will be observed *that whatever contract rights there were binding the railroad company, they belonged solely to McGrew; that the insurance company had not insured him, and they were not entitled to be subrogated to any right he may have had against the railroad company, if he had any, and there was no attempt to assign any.*

In this respect the case is peculiar. But outside of

all this I contend that the Switzerland Insurance Company were not, in law, entitled to a verdict.

The question is presented by the charges asked and overruled, and by the exceptions to the general charge, and to the admission of evidence, some of which exceptions I will now present.

I.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY THAT THE PLAINTIFF, UPON THE EVIDENCE, WAS NOT ENTITLED TO RECOVER.

This question is presented by the following charge, asked and refused:

"The verdict of the jury must be for the defendant on the ground that there is not sufficient evidence to sustain a verdict for the plaintiff." *Pr. Rec.*, p. 30.

The whole evidence is before the Court. It is not voluminous, nor can it be said to be in conflict.

FIRST. The rule which governs cases of this character is thus succinctly stated by this Court in *Pleasant* v. *Fants*. They say:

"That in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the onus of proof is imposed." 22 *Wall.*, 120, 121.

In *Randall* v. *The Baltimore and Ohio Railroad Company*, the rule is a little more fully stated, in this language:

"It is the settled law of this Court, that when the evidence given at the trial, with all the inferences that a jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant." 109 *U. S.*, 482

In *Hyatt* v. *Johnston*, 91 Penna. St., the Supreme Court of Pennsylvania say:

"Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the Court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, it should be withdrawn from the jury." Pages 200 and 201.

The above sentence is quoted as the law by the Court of Appeals of New York, in *Dwight, et al.*, v. *Germania Life Ins. Co.*, 103 N. Y., p. 359. Both these courts refer to the case of *Ryder* v. *Wombwell*, Law Rep., 4 Exch., 39, where the same rule is stated.

The authorities to this effect are very many. See

Wittkowsky, et al., v. *Wassen*, 71 N. C. R., 455.

Bagley, et al., v. *Cleveland R. M. Co.*, 21 Fed. Rep., 165. 1-9

It is unnecessary to cite authorities for the rule, as there are quite a number of other cases in this Court, and I think I may say that the rule, where not controlled by statutory law, is quite general in the states.

Now, the controlling facts of this case were admitted or fully proved, and there was no opposing evidence. The evidence, "with all inferences which a jury could

justifyingly draw from it," entitled the defendant to a verdict.

It shows that neither the plaintiff or its assignors, Aiken, Lambert & Co., had any contract with the defendant whatsoever, and were wholly unknown to them; that McGrew was not known to be agent for Aiken, Lambert & Co., or to be connected with them or with any one else; that his contract simply related to the carriage of himself and his personal baggage from Cincinnati to Louisville; that they did not know that his trunk contained anything but baggage strictly so called; that he shipped it as "ordinary baggage" (*McGrew's Ev.*, p. 49), giving no notice of its contents, and that he paid nothing for its carriage. There was no evidence showing that the defendant knew that the trunk and its contents were not McGrew's, or that it contained merchandise. The trunk was a medium sized trunk (*McGrew's Ev.*, p. 42), and though the railroad company charged extra for the carriage of all baggage weighing over 150 pounds (*McGrew's Ev.*, p. 49), he paid nothing for its carriage, which showed that the trunk was small and not heavy, there being no evidenee as to its weight; that he, McGrew, had no interest whatsoever in the goods in the trunk (*McGrew's Ev.*, p. 49); that the railroad company had no knowledge of the contents of the trunk (*McGrew's Ev.*, p. 45), and there was no claim that McGrew had ever assigned any right he had growing out of his contract to the plaintiff below or to Aiken, Lambert & Co., if any he had.

Now, these facts entitled the defendant below to the charge above set forth, and the Court erred in not giving it.

There are no facts in the case that justify the refusal of such charge, or which entitled the plaintiff below to a verdict. The facts are all set out in the record, and there are none that show gross neglect; and when the fact that the baggage master was engaged with a hot box—a part of his regular duty—is considered, there was no evidence that showed neglect on the part of the conductor or baggage master; and unless the defendant below was responsible for the express messengers and liable for their neglect in getting asleep, if they did fall asleep (there was no proof of it), there is no fair evidence showing any neglect. It is true that the jury, in their special findings, found that the trunk was lost by gross neglect of the defendant. *Pr. Rec.*, p. 21. That finding, however, was so unsupported by evidence that the Court set it aside. *Pr. Rec.*, p. 22.

The jury must have found their verdict under the general charge, upon the ground of gross neglect, or upon the proof of a custom of the defendant to carry drummers' trunks free of extra charge.

Now, we maintain that these facts did not authorize a verdict for the plaintiff, and that the Court should have given the charge above set forth.

No case presenting precisely these facts can be found where the carrier has been held liable, but several from

courts of the highest authority in the country where the decision has been the other way.

Among other cases, see the following:

Dunlap, et al., v. *International Steamboat Co.*, 98 Mass., pp. 378–79.

Alling v. *Boston and Albany R. R. Co.*, 126 Mass., pp. 131, 132.

Blumantle v. *Fitchburg R. R. Co.*, 127 Mass., p. 324.

Haines v. *Chicago, St. P., M. & O. Ry. Co.*, 29 Minn., p. 161.

Michigan Central R. R. Co. v. *Carrow*, 73 Ill., pp. 358, 359.

Gardner v. *New Haven & Northampton R. R. Co.*, 51 Conn., p. 143.

Macrow v. *Great Western R. R. Co.*, B. L. R., 6 Q. B., p. 620.

Cahill v. *L. & N. W. R. R. Co.*, 10 C. B. R. N. S., p. 171.

Great N. R. W. v. *Shephard*, 8 Exch., 37.

These cases are directly in point, and I shall quote some passages from them to show their bearing upon the case now before the Court.

In *Dunlap, et al.* v. *International Steamboat Company*, the Court say, C. J. BIGELOW giving the opinion:

"In regard to carriers of passengers, there can be no doubt that persons who enter into contracts with them to transport themselves and their luggage, nothing being said as to the contents of the parcels which are delivered for carriage, and these being in the form of trunks or valises such as are commonly used for clothing and other personal effects, represent by implication to the carriers that they contain no articles or property not

properly included within this class or description, and such as a traveler may carry with him as part of his luggage, and for which he can hold the carrier responsible under his contract. If other and different articles of greater value are contained in such trunks or valises, it is a disguise of their true nature and value, and operates as an unfair and fraudulent concealment of them which absolves the carriers from liability, therefor in case of loss. Nor is this all. In such a case, the owner can prove no contract for the transportation of any articles other than wearing apparel and other ordinary personal effects and an amount of money reasonably sufficient for the payment of traveling expenses. What is the contract into which the carrier enters when he receives a passenger? It is only to transport him safely, together with such articles and money as are properly contained in the luggage which he brings with him; but he does not contract to transport any thing which he may bring with him in the shape of luggage, when in fact it is not properly such, but merchandise and money which he cannot ask the carrier to receive in that form. Therefore it is that he cannot be held liable at all, not even for gross negligence, for the loss of any articles not embraced within the contract. He did not agree to receive or transport money beyond a certain amount, or merchandise of any kind; and he cannot be held liable for any, even the smallest degree of care of that which he did not agree to take into his possession and keeping." * *

"These principles are decisive of the rights of the parties to these actions. The only contracts into which the defendants are shown to have entered with the plaintiffs are for the carriage of one of them with his luggage, and of the other without any luggage. To the former they are liable only for the sum found by the jury to be the value of his wearing apparel and personal effects, and for the sum of money contained in his valise necessary to defray his traveling expenses. To the other plaintiff they are not liable at all, because he has not shown to have made any contract with them to transport luggage. The money belonging to him in the valise of the first plaintiff cannot be recovered. Of its existence the defendants had no knowledge. It was concealed from them by being put into luggage which was delivered to and received by them, as belonging to one passenger only. It was as such that they agreed to carry it. It was in effect a concealment of its real value to put into it a larger amount of money

than was sufficient for the expenses of a single passenger. This enhanced the risk assumed by the defendants, without their knowledge. It exposed them to the hazard of incurring, by the loss of the luggage of one passenger, a heavier liability than they had ever agreed to assume. It is obvious that this was a practical fraud on the defendants. Nor can we see any limit to the amount of liability which might be thus imposed on carriers of passengers, without notice to them, if they can be held to be chargeable in this action beyond the amount of money which one person might properly carry." 98 *Mass.*, pp. 378 and 379–80.

The whole of the above is in direct opposition to JUDGE SAGE'S charge.

In the case of *Alling* v. *Boston & Albany R. R. Co.*, the same learned court say:

"Upon the contract implied by the sale of a ticket to Kerr, the plaintiffs can maintain no action, and Kerr could not recover for the loss of the jewelry contained in his trunk."

* * "The defendant thus received it under the contract implied in the sale of a ticket that it would safely transport the passenger and his proper personal baggage. The plaintiffs contend that the jury might find that the defendant's agent knew from the appearance of the trunk that it was the trunk of a person 'known as a commercial traveler,' and contained merchandise. There was no evidence that he knew this. The most that the evidence shows is that he may have suspected from the appearance of the trunk that it contained merchandise other than baggage. But this fact would not affect the rights of the parties. Kerr offered and delivered the trunk as his personal baggage; he thus represented by implication that it contained no property not included within that class or description."

* * "The plaintiffs offered to show 'that a large part of the defendant's business consisted in transporting a large class of passengers known as commercial travelers, with trunks like this, containing merchandise of great value, and that these trunks are known as sample or merchandise trunks, and are of special construction, and in the course of that business the commercial travelers purchase tickets for the ordinary passenger trains and receive checks for their said trunks, and the defendant under-

takes to transport the traveler and trunk accordingly for the price of the ticket.' The court properly rejected this evidence. The same evidence in substance was offered and rejected in *Stimson* v. *Connecticut River Railroad*, above cited." * * * * "The fact that commercial travelers or others are accustomed to carry merchandise in passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carriers, will not render them liable for such merchandise. The travelers carry such merchandise at their own risk. The established rule of law which limits the responsibility of the carrier, upon the contract implied by the sale of a ticket to a passenger, to the proper personal baggage of such passenger cannot be annulled, and the liability of the carrier enlarged, without proof of an agreement to that effect entered into by the carrier." 126 *Mass.*, pp. 130–31–32.

Again this very learned Court, in *Blumantle* v. *Fitchburg R. R. Co.*, say, C. J. GRAY delivering the opinion:

"Such an agreement cannot be proved, or such a responsibility created, by mere evidence of a custom of passengers to take with them, and of railroad corporations to carry, similar packages as personal baggage; or by evidence that the package, delivered by the passenger as baggage, is of such form or appearance as to raise a doubt or suspicion or inference that it contains merchandise." * * * * "In the case at bar, the plaintiff offered and delivered the bundles as his personal baggage, and requested that they might be checked as such; and the baggage-master gave him checks for them accordingly, as he was bound to do for personal baggage of passengers by the St. of 1874, Ch. 372, Pr. 136. There was no evidence that either the plaintiff or the baggage-master agreed or intended that they should be carried as freight, or that the baggage master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage. The case cannot be distinguished in principle from the previous decisions of this Court, already cited. Evidence tending to show that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff's merchandise, or became liable therefor as a common carrier." 127 *Mass.*, pp. 324 and 326.

The last two cases are equally in point with that decided by CH. J. BIGELOW, and they are in direct opposition to the charge of Judge SAGE.

A similar decision has been made in Minnesota, in *Haines* v. *Chicago, St. P., M. & O. R'y Co.*

"Two things are to be observed regarding this statement of facts: *First*, the contents of the valise were not the "personal baggage" of plaintiff; at least it does not appear and is no where alleged that they were; and the description of the property contained in the complaint, we think, affirmatively shows that they were not. *Second*, it is not alleged or admitted that the defendant had any notice that the contents of the valise were not plaintiff's personal baggage On such a state of facts plaintiff would not be entitled to recover A carrier of passengers for hire is only bound to carry their personal baggage; and if a passenger delivers to a carrier as baggage a trunk or valise containing property, not his personal baggage, and the carrier has no notice of the fact, he is not responsible as carrier or insurer for its loss. The reason is that as to such property the carrier has made no contract." 29 *Minn.*, p. 161.

A somewhat similar case was decided by the Supreme Court of Connecticut. *Gardner* v. *N. H. & N. H. R. R. Co.*, 51 Conn., 146.

The case was one where Dr. Gardner, a brother of the plaintiff, desiring to ship a horse from Northampton to Harlem River, requested John C. Avery to procure transportation for the horse along with his horses, and for the plaintiff to go in the car with the horse and take care of him. Avery was taking seven horses of his own to Harlem River. He bargained with the New Haven & Northampton Railroad Company to transport eight horses from Northampton to Harlem

River. Gardner's horse was in care of the plaintiff, who was taking it to New York.

Among the rules for the shipment of stock it was provided that one man could go with his stock to take care of it. When Avery engaged the transportation, he said to the agent of the railroad company that there might be another man to go with him, to which the agent said: "Then one of you will have to pay fare." Though Avery referred to the plaintiff he did not mention him to the railroad agent.

I take this from the report of the case:

"Just as the train was about to start, Gardner said he must go and pay the freight on his horse; I said I had paid it at the same time I paid mine. He then said: 'Let me pay you.' I said: 'Let it go till we are on the car.' He then said: 'Hadn't I better go and get a ticket?' I said: 'You will not have time now to go to the passenger depot and get back; you can pay the conductor on the train when he demands it." *51 Conn.*, p. 146.

In deciding the case the Court say:

"The whole controversy in the case depends upon this question—was there any contract relation, express or implied, between the plaintiff and the defendant in this case; or, in other words, was the plaintiff a passenger according to the legal meaning of the term on the defendant's road at the time the accident happened?" *51 Conn.*, p. 150.

The plaintiff contended that he intended to pay his fare when the conductor called for it. He was injured when on the car with the horses, by a collision caused by the fault of the railroad company. The Court held that the plaintiff had no contract with the railroad company and could not recover from the defendants.

The question of the liability of the carrier, under

such circumstances, has been considered in a learned case in Illinois, *The Michigan Central R. R. Co.* v. *Carrow.* In that case the Court say:

"The company had no actual notice appellee's trunk contained anything other than his wearing apparel, and such articles of convenience as a passenger usually carries with him. It was brought to the company's depot with the other passengers' baggage, was checked as ordinary baggage, and was, with his knowledge and consent, placed in the common baggage car. He paid no extra compensation, nor did he bargain for any care in regard to it, other than such as it was the duty of the company to bestow upon the baggage of other travelers. There was nothing in the character of the trunk itself that indicated it contained valuable merchandise. It was such a trunk as is usually carried by commercial travelers. A person accustomed to seeing such trunks would, no doubt, recognize this as one of that class. Whether the baggageman who checked appellee's baggage had any knowledge of the use of such trunks, does not appear from anything in the evidence. He had no acquaintance with appellee, and did not know what his business was." (In the case now before this Court it was shown, and the jury found, that he had no such knowledge.) *Pr. Rec.*, p. 21, finding No. 2. "But, conceding it was of such weight and structure as the baggage master must have known it was a commercial traveler's trunk, he had no reason to suspect that, in addition to the articles usually carried by a traveler, it contained valuable jewelry, comprising a stock equal, if not exceeding, in value that which is commonly kept in a retail store."

"Appellee presented it as ordinary baggage, and the officer of the company had the right to rely upon the representation, arising by implication, that it contained nothing else. The law imposed no obligation upon him to make any inquiry as to the contents." * * * *

"But the rule is different in regard to the baggage of a traveler. As we have seen, the fact the traveler presents a parcel as baggage, whether contained in a trunk or satchel, or other convenient mode of carrying baggage, it is upon the implied representation it contains only baggage, and the carrier is not bound to inquire as to the specific contents. There is no reason for the adoption of any other rule. No considerations of public

convenience require it." 73 *Ill.*, pp. 350–1–2. * * * * "The company may rely upon the representation that whatever is offered as baggage is that, and nothing else. The law seems to be settled it need not inquire as to its contents. If the passenger has merchandise checked as baggage without such notice, the company cannot be held liable as a common carrier." 73 *Ill.*, pp. 352 and 353. * * * * "In *Cahill* v. *L. and N. W. Railway Co. supra*, WILLES, J., very aptly remarks, that 'where a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal lugagge only, and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions.' So we say in this case, it was not in the power of appellee to extend the liability of the company on account of his own convenience." 73 *Ill.*, p. 353. * * * * "Where goods have been placed in the carrier's possession without his knowledge and consent, as they were in this case, there can be no contract of bailment. The want of fair dealing on the part of the bailor is a full answer to an action upon any implied contract of bailment for hire." 73 *Ill*, p. 357. * * * * "It is said the baggagemen and expressmen in charge must have been asleep, and thus neglectful of their duty. One answer to the suggestion is, the company had not placed these persons there to watch that character of property; and another, more conclusive one, is the record contains no evidence whatever of the fact alleged." 73 *Ill.*, p. 359." (In this respect it was like the case now under consideration.) * * * * "The more reasonable rule, and the one best calculated to subserve the ends of justice, is, the passenger, who has the information, should apprise the company of the extraordinary value of the package he desires to have checked as baggage, and, upon failure to do so, if loss ensues, he must bear the consequences. Under the most friendly criticism, appellee's conduct savors of legal fraud, not to characterize it by any stronger terms. He is not, therefore, in a position to demand any favorable construction of the evidence." 73 *Ill.*, p. 360.

In *Cahill* v. *L. & N. W. Railway Co.*, ERLE, C. J., says:

"It seems to me that it would be introducing a most pernicious rule, to hold, that, if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood to be personal luggage, or merchandise, at the peril of being held liable for a loss if loss occurs." 10 *C. B. N. S.*, p. 176.

WILLES, J., says:

"That the true answer to the plaintiff's claim is, that there never was any contract on the part of the company to carry the package which was lost." 10 *C. B. N. S.*, p. 172.

In the same case, BYLES, J., says:

"I do not think the company's servants were bound to ask any questions. The package was handed to them as ordinary luggage. That being so, I agree with my Lord in adopting what was said by Lord Wensleydale in the Great Northern Railway Company, app.; Shepherd, resp., 8 Exch., 30, viz: that the defendant's conduct — without imputing to him any fraudulent intent — in delivering a package of this description without communicating the fact that it contained merchandise, was in the nature of a concealment, and amounted to a positive representation that it contained ordinary personal luggage only. If that be so, there was no bailment, and no contract. 10 *C. B. N. S.*, p. 178.

In *Macrow* v. *Great Western Railway Company*, the Court (by COCKBURN, C. J.), adopting the charge in *Cahill* v. *London and North Western R'y. Co.*, says:

"But, on the other hand, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company, to whom he has been abstained from giving notice of the contents. In such a case he carries it at his own risk." *B. L. R.*, 6 *Q. B.*, pp 619–620.

The above authorities present the question raised by this charge very fully. While some of them incidentally allude to gross neglect, as that it might affect the question, they use that term in the sense of a reckless disregard of property. As is said by the Supreme Court of Illinois,

> "Gross negligence has always the element of recklessness. It can hardly be said to be gross, with that element wanting." *Michigan Central R. R. Co.* v. *Carrow*, 73 Ill., p. 357.

See, also,

T. W. & W. R. R. Co. v. *Brigs*, 85 Ill., 84.
Rice v. *Ill. Cent. R. R. Co.*, 22 Ill. App., 648.

Gross negligence, in such a case, is where it is apparent that the party does not care whether the property is lost or not.

And as suggested by C. J. GRAY, in the case of *Bluemantle* v. *Fitchburg Railroad*, 127 Mass., p. 325, the decision in all these cases was in favor of the carrier, and the question was not directly involved.

In reference to the want of care in the baggage man of the train and the conductor thereof, it should be borne in mind that they had been troubled with a hot box, to which their attention was necessarily called, and which created an odor that prevented their perceiving the smell of the fire when it caught (*Pr. Rec.*, p. 77); that there was no fire in the baggage room, and that the baggage man had but a short time before opened the door and found all safe (*Pr. Rec.*, p. 93); that there were two express agents in the forward compartment

who had charge of it, and that there was an open passage from the baggage room to the express room. He might well trust that there could be no fire there that the express agents would not at once discover.

How the fire caught was not shown, and the burden of showing it as an element of want of care was upon the plaintiff. All that was shown is that the agent of the Adams Express Company had his hands burnt, and it was therefore assumed that he was asleep. Murdock, who was the express agent of the defendant, had a seat in the express room. He thought the fire came from the baggage room, but first saw it coming from the mail room. How it happened neither he nor the other express agent knew; at least, they do not state.

There was no proof showing gross neglect, nor any direct proof showing neglect. All there is applies to the express messengers—not under the direction of the baggage master or the conductor of the train.

SECOND.

THE CASES CITED FOR THE DEFENDANTS IN ERROR.

Sundry cases were cited for the plaintiff below, to which I would call attention. They were

Pennsylvania Co. v. *Miller*, 35 Ohio St., 541.
Sloman v. *Great Western R. R. Co.*, 67 N. Y., 208.
Hannibal R. R. Co. v. *Swift*, 12 Wall., 262.
Conn. & Am. R. R. Co. v. *Baldorf*, 16 Penn. St., 67.

Cahill v. *The L. & N. W. R. W. Co.*, 13 C. B. N. S., 819.

Macrow v. *The G. W. R'y. Co.*, L. R., 6 Q. B., 619.

The case of the *Penna. Co.* v. *Miller*, 35 Ohio St., 541, was where the defendant received the valise of the plaintiff's agent and placed it in his warehouse. Burgulars broke into the warehouse and the next morning the valise could not be found. The jury rendered a verdict for $180. The Court set aside the verdict because there was no evidence to sustain it, the claim of the defendants being that there was no evidence showing authority of the railraad agent to make the contract.

What authority had the omnibus agent to enter into any such contract, had he done so? (See special charge No. 13.)

The case of *Sloman* v. *Great Western Railway Co.*, 67 N. Y., was one where the plaintiff's son and traveling agent presented two large trunks and a valise to the railroad agent, and such conversation was had at the time as showed that he was engaged in merchandising with his trunks. He was charged $2. for the transportation of the trunks.

The Court say:

"If the trunks and this compensation were received with notice that the trunks contained property other than the baggage of the passenger, then there is evidence of an agreement aside from the contract to transport the passenger, and for a separate consideration, to carry such property as freight, and this will sustain the recovery." *67 N. Y.*, pp. 211, 212.

Further on the Court say:

"It does not appear that it was stated, in terms, to the bag gage-master what the trunks contained, but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggage-master, and the dealing between them and if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight. P. 212.

Still further on the Court say:

"We think that, upon this evidence, the judge was justified in submitting the question of notice to the jury. If they believed the testimony of the young man, Marcus, the baggage-master had had notice that he was traveling for the purpose of selling goods, and carrying these trunks for that purpose, as the place to which he wished them carried depended upon his meeting with customers. It is highly improbable that a lad of his age, and traveling on such business, would carry with him such large trunks for the transportation of his personal effects; and the fact that the baggage-master charged or received extra pay for their carriage is some evidence that they were not regarded as ordinary traveler's baggage, especially as the defendant did not offer any explanation of what the charge was for. From all the circumstances, the jury were, we think, authorized to draw the inference that the baggage-master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore the extra charge was made, and they were carried as freight." Pp. 213, 214.

There is nothing in these cases that can aid the plaintiff below. In the case last named the trunk was presented as *freight* and compensation paid for its carriage as freight, and the question here involved was not presented.

The case of *Hannibal R. R. Co.* v. *Swift*, 12 Wall., has just as little bearing upon the case now being presented. That was a case that occurred in the early part of the late war. The plaintiff, Swift, was a surgeon in the army, formerly stationed at Fort Randall, Dacotah Territory, who was ordered to report at Cincinnati. The plaintiff was accompanied by his wife and family, and they took along with them their wearing apparel, some household outfit, and other property. On demand of the commanding officer the railroad company furnished transportation for troops, their baggage, equipments, arms, munitions of war, and the chattels of himself as well as the plaintiff. No compensation was agreed upon until the parties arrived at Hannibal. A surgeon in the United States army is entitled, by army regulations, to 800 pounds of baggage. Among other things, the plaintiff had with him. (I quote from the report.)

"Table furniture, including silverware to the value of $204 50; three buffalo robes, two deer robes, hair mattresses and pillows, writing-desks, tables, engraving pictures, and statuary, and numerous articles of a household outfit; besides jewelry to the value of $787.50; a set of surgical instruments of the value of $350, and an unpublished manuscript on veterinary surgery. The property weighed twenty-seven hundred pounds

The value of the jewelry as above stated, and $1,000 as the value of the manuscript, were allowed by the referee in assessing the damages." Page 265.

The Court say:

"A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes,

hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise." Pages 273, 274

Again the Court say;

"But if the property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportotion on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage." P. 274.

Again they say:

"On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed that when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family." P. 274.

The Court also say:

"It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff." P. 275.

There is nothing in this case that shows that the carrier did not charge for much of this property as freight. It was a lumping consideration in which the family and goods, the latter being open and visible, were charged a proper compensation.

Contracts for the transportation of families with their goods to be carried for a lumping sum have been frequent, as every lawyer of large practice knows.

The property belonged to the plaintiff and no question was made as to his right to sue for it. It was one of the cases where families moving take their baggage and other property with them, and where the charge is made without reference to its general character, whether as baggage or freight.

There is nothing, therefore, in this case opposed to the plaintiff in error in the case now under consideration.

The case of *Camden and Amboy Railroad Company* v. *Baldauf*, 16 Penna St., 67, was one where the plaintiff took passage with the defendants and delivered his trunk, which contained clothing and 2,101 five franc pieces. Besides his ticket, he paid extra for the carriage of his baggage. The defense set up a notice, printed on the ticket, in this language:

"All baggage at the risk of the owner thereof. The proprietors binding themselves to no charge or care of the *same* whatever, either express or implied."

This was printed in English and the plaintiff was a German. After discussing the policy of the law as against common carriers, the Court say:

"Although it may be granted that in this state a carrier may

limit his responsibility, yet this principle has been reluctantly recognized, and must be confined to cases of special contract express or at least implied. The knowledge of the plaintiff of the contents of the notice is negatived by the verdict. It is substantially found the plaintiff had no notice that his goods were carried at his own risk. In the absence of all proof of notice, the plaintiff had a right to rely on the common law responsibility of the carrier. The jury find that the extra weight of the plaintiff's baggage, including the trunk in which the specie was placed, was paid for by the plaintiff, and the agents of the company had charge of it.

Whether the specie is to be viewed as baggage or as freight we conceive to be immaterial; for whether it be the one or the other, the defendants are clearly liable on two grounds; first, because they have failed to prove the nature and manner of the loss; and second, because they have also failed to bring home knowledge of the limitations and restrictions contained in their notice to the plaintiff." Pages 78, 79.

Here was no question as to there being a contract with the plaintiff. He made no *express* contract. He paid extra for his baggage or freight, whichever it may be called, and I maintain that this case can have no bearing favorable to the defendants in error.

In the case of *Stoneman* v. *Erie Railway Company*, 52 N. Y., 433, the Court say:

"There is no finding, no proof, that she in any manner concealed the contents of the packages from the defendant, or that she in any manner represented them as containing only her personal baggage; and the finding is that the defendant transported them as merchandise, not as baggage, extra or otherwise." Page 433.

Still further on they say:

"I think it safe to say that, if the carrier knew or had notice of the character of the goods taken as baggage and still undertook to transport them, he is liable for their loss, although they

are not traveler's baggage. (2 *Red. on Railways*, 149, 151, note 5, and cases.)

But as I do not regard the question argued in the appellant's brief as to the liability for goods assumed to be transported as extra baggage and paid for as such, as presented in the case, it is not necessary to consider it." Pages 433, 434.

No question such as arose in the case before the Court arose in that case. It was the plaintiff's property; he contracted for its carriage and paid for it, not as baggage *but as freight.*

The case of *Cahill* v. *L. & N. W. R'y Co.*, 13 C. B. N. S., was a decision by CH. J. COCKBURN, where he says:

"If a railway company, who by the Act of Parliament are bound, or by their regulations profess to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandise, I quite agree that it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise and not of ordinary luggage. But, on the other hand, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk." Pages 818, 819.

The same learned judge repeats this sentence in *Macrow* v. *Great Western R. W. Co.*, B. L. R., 6. Q. B., 619.

The first of the above cases was for the recovery of a box, on which was printed, in large letters, "Glass." It contained merchandise only, and the Court of Common Pleas held, that inasmuch as the box contained

merchandise only, and not personal baggage, there was no contract on the part of the company to carry it, and that consequently they were not liable for its loss. 10 *C. B. N. S.*, 154. The judgment of the Common Pleas was affirmed. 13 *C. B.*, 819.

"This box was covered with a black leather case which had painted on the top of it in the centre, lengthways, the name of "M. Rimmel" in white letters about two inches long; and it had painted across the top on each end the words "Glass." 10 *C. B. N. S.*, 157.

This case finally came before C. J. ERLE, WILLES, J. and BYLES, J.

C. J. ERLE, in his opinion, says:

"It seems to me that it would be introducing a most pernicious rule, to hold, that, if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood to be personal luggage, or merchandise, at the peril of being held liable for a loss if loss occurs." 10 *C. B. R, N. S.*, 157.

Again he says:

"It is said that the plaintiff had no express notice that he ought to have paid for the carriage of this box; but, on the other hand, the defendants had no express notice that it contained merchandise which they were entitled to charge for, and not personal luggage." Page 170.

He further says:

"As was said by Parke, B., in The Great Northern Railway Company, app.; Shepherd, resp., 8 Exch., 37: 'The contract was, to carry passengers and their luggage. If the company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but, if no notice is given, there is an unfair concealment, which prevents them from making a charge as for merchandise.' It seems to me that that is perfectly just." Pages 170, 171.

BYLES, J., says:

"I do not think the company's servants were bound to ask any questions. The package was handed to them as ordinary luggage. That being so, I agree with my lord in adopting what was said by Lord Wensleydale in The Great Northern Railway Company, app., Shepherd, resp., 8 Exch., 30, viz: that the defendant's conduct,—without imputing to him any fraudulent intent,—in delivering a package of this description without communicating the fact that it contained merchandise, was in the nature of a concealment, and amounted to a positive representation that it contained ordinary personal luggage only. If that be so, there was no bailment, and no contract." Page 178.

The Court will bear in mind that this trunk was checked by the omnibus driver at the hotel, as the baggage of McGrew, and that nothing more was said in relation to it. *See McGrew's Ev., Pr. Rec.*, p. 46. At least, it did not appear and was not pretended that any thing more was said.

In that case the suit was by the party making the contract, and whose rights alone the Court were considering.

The case of *The Great Northern R. R.* v. *Shepherd* is referred to, and I take the following from that decision:

"The case finds that they had no notice of what the packages contained Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the Company were not aware that he was not carrying luggage, and therefore the loss must be borne by him. 8 *Exch.*, p. 39.

The jury found that the checking agent had no notice, when he checked the trunk, that it contained jewelry or property other than personal baggage of McGrew. *Pr. Rec.*, p. 21; *this brief*, p. 7.

The case of *Macrow* v. *Great Western R. W. Co.*, was a suit brought for some sheets, blankets and quilts carried by the plaintiff with his baggage. The judgment was against the plaintiff as to these articles. *B. L: R.*, 6 *Q. B.*, 620.

The case of *Minter* v. *Pacific R. R.*, 41 Mo., was of similar character, and I take the following from the opinion of the Court:

"But if the traveler takes with him other articles, which do not come strictly within the denomination of baggage, and exposes them to view, so that no concealment is practiced, and the carrier chooses to treat them as personal baggage and carries them accordingly, and a loss occurs, he will be responsible therefor." Page 507.

Now, while it may be that a railroad company receiving such property, knowing what it is, would be liable for some degree of care, it would not be liable as common carrier therefor.

An officer, appointed to check baggage, has no position authorizing him to check other property as baggage. It is beyond the scope of the position in which he acts, and beyond any real or apparent authority given him. I have much doubt as to the correctness of the decision in 41 Mo., for the reason that the roll of carpet must have been known to both parties as not baggage, and certainly the carrier was entitled to compensation for its carriage. Suppose the property had been a horse and the baggage master had checked it as baggage and agreed to carry it free of charge, would not the carrier be entitled to freight money for its carriage? While, if the property was of doubtful character, it might have

been contended that it was within the usual and ostensible scope of the employment of the baggage master to determine its character, yet it must be clear that the case was one where there was fair ground to consider the property as baggage. Why should it not be held in the case of *Minster* v. *Pacific R. R. Co.*, as it was in *Blanchard* v. *Isaacs*, 3 Barb., 388, 389, that the property being not baggage, clearly so, and as such known to both parties, the plaintiff, unless he shipped it as freight and paid for it as such, shipped it at his own risk? If the property were of debatable character as to its being baggage or not, as, for instance, if it were the tent and blanket of a soldier, or the tent and poles of an engineering party, the gun of a sportsman, the fishing pole and line of the fisherman, the tools of a carpenter or mason, as to which, however, there is much variance of opinion (*Pruty* v. *Grand Trunk Railway*, 32 Upper Canada R., pp. 74, 75), the instruments of a surgeon, or the like, then it would be within the apparent authority of the baggage master to check it as baggage; but to extend the rule indefinitely would be inconsistent with the law relating to the authority of agents.

The authorities cited by the defendant in error do not apply to this case. There was no pretense in the evidence that the baggage master who checked this baggage knew that it was not the personal baggage of McGrew, and this fact is found by the jury. *Pr. Rec.*, p. 21.

There may be some few other cases that have sim-

ilar expressions to those above, but we contend that there can be no case found where the passenger shipped the property as his personal baggage and paid nothing for its carriage, and where the carrier, as in this case, had no knowledge that it was anything else, that he has been held liable for its loss, and especially to persons who were not passengers and who have made no contract with the carrier. For the law of Canada, see *Lee* v. *Grand Tr. R. W. Co.*, 36 Ontario, Q. B. R., 354.

I have referred to and quoted from the above cases to show their bearing upon the questions involved in this record. We submit that they show that the plaintiff below did not make out a case entitling them to the judgment they obtained; that there was no want of care that made the defendant below liable for this loss, and that the custom referred to in the charge, if proven, did not render them liable in this action to the plaintiff below. See, specially,

Dunlap v. *International St. Bt. Co.*, 98 Mass., 378–9.
Alling v. *Boston & Albany R. R. Co.*, 126 Mass., 130
Blumantle v. *Fitchburg R. R. Co.*, 127 Mass., 326
Mich. R. R. Co. v. *Carrow*, 73 Ill., 350.

The whole evidence is before the Court upon the refusal to give this charge. The error of the Court in this regard will more fully appear when certain portions of the general charge and parts of the evidence, specially excepted to, are considered.

The Court therefore erred in not giving the charge asked, as to the right of the plaintiff to recover.

II.

SPECIAL CHARGES REFUSED AND EXCEPTIONS THERETO.

CHARGE NO. 1 was in these words:

"If McGrew had no interest in the goods in question at the time they were delivered to the man checking the baggage, or at the time of the loss, the plaintiff cannot recover. *Pr. Rec.*, p. 28.

The authorities above cited cover this charge. They show that McGrew had no contract in relation to these goods, nor had Aiken, Lambert & Co.

CHARGE NO. 2 was in these words:

"If the agent of the railroad company who checked the trunk had no notice at the time it was checked that it contained jewelry and not baggage, then the plaintiff cannot recover."

"Which charge the Court refused to give as asked, but qualified the same by charging that the defendant in such case would only be liable for gross neglect." *Pr. Rec*, p 28.

The question of *gross neglect* is out of the case. The Court set aside the finding of gross neglect as not justified by the evidence (*Pr. Rec.*, p. 22), and the Court should then have set aside the verdict, as the jury must have found it under that charge, if based upon the want of care.

The ground upon which this charge was asked was, that the defendants had made no contract with any one about these goods—not even with McGrew. The contract with him was to carry him and his personal baggage. It did not go beyond it, and under the authority of the cases above cited, the defendant was not liable.

There was no evidence of knowledge of the defendant that the trunk contained anything but the baggage of McGrew. There was no evidence to meet this charge, for though there was proof that the railroad company carried salesmen's trunks free of charge, it was nowhere shown that they did so for persons not passengers. Parties may take their own goods around the country and sell them. Some one of the partners of a firm may do this for the firm; they are often drummers or traveling salesmen of their own goods.

CHARGE No. 3 was in these words:

"If the trunk containing the jewelry was fit and proper for the carriage of baggage, and such a trunk as baggage was sometimes carried in, and it was shipped as ordinary baggage and no notice was given that it contained anything else, then the plaintiff cannot recover."

Which charge the Court refused to give as asked, but qualified the same by adding that the defendant would in such case only be liable for gross negligence, *Pr. Rec.*, p. 28.

This charge is covered by the authorities before referred to. See

Dunlap, et al. v. *Inter. Steamboat Co.*, 98 Mass., 378.
Alling v. *Boston & Albany R. R. Co.*, 126 Mass., 130
Blumantle v. *Fitchburg R. R. Co.*, 127 Mass., 324.
Haines v. *Chicago, St P., M. & O. R'y Co.*, 29 Minn., 161.
Gardner v. *New Haven & Northampton Co.*, 51 Conn., 150.
Michigan Central R. R. Co. v. *Carrow*, 73 Ill., 360.
Cahill v. *L. & N. W. R. R. Co.*, 10 C. B. N. S., 172, 178.

Quotations from these authorities will be found in the foregoing brief, from pages 12 to 26 inclusive.

CHARGE No. 4 is in these words:

"If the trunk in question was one fit for the carriage of ordinary baggage, and such a one as travelers sometimes carried their ordinary baggage in, then the fact that the checking agent knew that it was a trunk such as traveling salesmen ordinarily carry their goods in would not entitle the plaintiff to recover, if it was delivered by McGrew to the checking agent as ordinary baggage, and was so checked by the said agent."

"Which charge the Court refused to give as asked, but gave it by inserting the word "mere" between the words "the" and "fact" in the sentence, "then the "mere" fact that the checking agent knew, etc." *Pr. Rec*, p. 28.

CHARGE No. 6 is in these words:

"If it appear that the trunk in question was checked at the hotel where McGrew was stopping, that it was checked for him as ordinary baggage, and that he represents it as such and gave no notice that any one but himself was interested in it, or of what the trunk contained, and that there is no evidence whether traveling salesmen sell their own goods or those of other parties, and if he made no contract as to its carriage but such as might be implied from his purchase of a first-class passenger ticket, and paid nothing for its carriage as merchandise, or especially for the carriage of the baggage, and if he, said McGrew, had no interest in the goods at the time or when they were lost, then the plaintiff cannot recover in this suit." *Pr. Rec*, pp. 28 and 29.

This charge is covered by the above authorities, each and all of them. See

Dunlap v. *Inter. St. Bt. Co.*, 98 Mass., 378, 379.

Alling v. *Boston & Albany R. R. Co.*, 126 Mass., 131, 132.

Michigan Central R. R. Co. v. *Carrow*, 73 Ill., 360.

Haines v. *Chicago, St. P., M. & O. R'y Co.*, 29 Minn., 161.

Cahill v. *L. & N. W. R. R. Co.*, 10 C. B. N. S., 172, 178.

CHARGE No. 7 is in these words:

"If the Adams Express Company had an express agent placed upon the car by order of this Court, and he occupied one end of the car for his express goods, over which end the baggage-master of the defendant had no control; and if the fire originated in that part of the car and from his fault, and did not originate in the baggage end of the car, over which the said baggage-master had charge, and if the baggage master, at the time the fire originated, was attending to his duties upon the train, then the fire and loss cannot be attributed to him or the defendants.". *Pr. Rec.*, p. 29.

This has reference to the proof in the case as to the injunction order of Judge Baxter, made at the instance of Mr. Justice Matthews of this Court, when at the bar, and which will be found in the printed record, pp. 81 and 82.

Under this order the defendant was required to take this agent of the Adams Express Company upon the train, and they had no control over him or his goods. *Pr. Rec.*, p. 81.

Is it true that after such an order of Judge Baxter, compelling the defendant to take this agent into their car, and forbidding them from "interfering with any of the express matter or messengers of the Adams Express Company," that the company were bound for the conduct of such agent, and that his neglect would charge the defendant below with the loss in question, and especially as to goods shipped as the goods in question were?

CHARGE No. 8 is in these words:

"The question in this case is not what ordinary traveling salesmen usually do, or what style of trunks they usually have, or what contracts they usually make with the railroad companies transporting their trunks, but what was the character of the trunk in question and what took place between Megrue and these defendants or their agents, and the burden of proof is upon the plaintiffs to show that the defendants knew what the trunk in question contained, and after such knowledge agreed to carry it without further compensation than was embraced in the ordinary fare paid by Megrue."

"Which charge the Court refused to give as asked, but gave the same and added thereto that they must have had knowledge or notice that the trunks contained something else than baggage." *Pr Rec.*, p. 29

This charge, as qualified, made the defendant liable for all this merchandise, if the agents of the defendant had notice that *anything* else than baggage was in the trunk, irrespective of the amount or character of the things not baggage, or of the ownership thereof. Would not the reasonable conclusion, in such a case, be that the checking agent supposed the freight was carried at the risk of the plaintiff?

CHARGE NO. 10 is in this language:

'If it appears that the trunk in question was delivered to one of the persons accompanying the baggage wagon at hotel by one Megrue, who had purchased a passenger ticket for that train, and that he had a valise, which he owned and which did contain his baggage, and that the trunk in question contained no personal baggage, and that he had no interest therein, but that it was checked with said personal baggage, without any other compensation or consideration than the purchase of said ticket; then, before the plaintiffs can recover in this action for the loss of said trunk, they must show that the party checking such trunk had authority from the company to bind the company for its carri-

age for a third person, not a passenger, without other compensation than his ticket, and that he did, with that understanding and having knowledge of the contents and ownership of said trunk, agree to carry and deliver it." *Pr. Rec.*, pp. 29 and 30.

Now, how can the refusal to give this charge be sustained? The law is and has been well settled as to the relation of passenger to carrier, and what the latter is liable for. And can that liability be extended without evidence of express authority of the carrier? What abuses and injustice to carriers might not such a rule lead to?

CHARGE NO. 11 is in these words:

"The defendant, without waiving the foregoing charges, ask the Court to charge the jury that the burden is upon the plaintiff to show that the loss was due to the gross neglect of duty of the baggage-master or of some other officer of the defendant on the train, either in causing the fire or in their efforts to save the baggage during the fire." *Pr. Rec.*, p. 30.

This charge was refused as asked, and was qualified by the general charge, which gave a false definition of gross neglect, and of the evidence of custom.

I maintain that the defendants were entitled to have that charge given, pure and simple. I desire the Court, however, to consider it in connection with Charge No. 13, which is in these words:

"If the person checking the trunk of McGrew was an employee of the omnibus company and was sent with their baggage-wagon to collect baggage of passengers and check it at the hotel, and was for that purpose entrusted with checks by the railroad company, then, unless there is some proof that he also had authority to check merchandise as baggage free of extra charge, or, to bind the defendant by a contract to carry such, the plaintiff cannot recover in this action." This charge was refused.

Now, is it possible that the agent of the omnibus company, intrusted with checks to be attached to the *baggage* of *passengers*, at their residences and at the hotels, has authority to check merchandise as baggage, free of charge, without proof of authority from the carrier so to do?

CHARGE No. 12 is in these words:

"That gross fault or neglect is the want of all the least care, and involves the idea of some recklessness or gross disregard of duty." *Pr. Rec.*, p. 30.

This charge was refused. It is taken from the case of the *Michigan Central R. R. Co.* v. *Carrow*, 73 Ill., 360, and from the case of *T. W. & W. R. R. Co.* v. *Briggs*, 85 Ill., 84.

The same idea is found in *Rice* v. *Ill. Cen. R. R. Co.*, 22 App. of Ill., 648; and I think the idea will be found in that beautiful and accurate book from which all of us got our first knowledge of the law of bailment, *Jones on Bailments.*

Finally, the Court was asked to charge.

"The verdict of the jury must be for the defendants on the ground that there is not sufficient evidence to sustain a verdict for the plaintiffs."

Which charge the Court refused to give.

The error in refusing to grant these special charges will be more apparent when the Court considers the general charge.

III.

GENERAL CHARGE AND EXCEPTIONS THERETO.

Exceptions were taken to some parts of the general charge, which, under the evidence, are not, in my opinion, justified. The following is a part of the charge.

"Unless having been informed of their true character, or knowing or being presumed to know from the circumstances that, though being carried by the passenger as baggage, they consist of merchandise, he accepts them for carriage, or unless there be an established custom or usage on the part of the carrier to carry merchandise or samples belonging to passengers and packed in trunks, or valises, or bundles, as baggage, and unless, also, the property is destroyed by reason of such negligence on the part of the carrier as I shall refer to in the further progress of the charge." *Pr. Rec.*, p. 39.

Now, what right had the Court to charge the jury, "That being presumed to know from the circumstances, that though being carried by the passenger as baggage, they consist of merchandise, he accepts them for carriage."

This statement, coming from the Court in its charge, was likely to lead the jury to think there was evidence to that effect. There was no evidence to authorize such a charge. There was no pretense of knowledge, and the jury has found that the defendant had no knowledge of the contents of the trunk. The Court adds to the above:

"Or unless there was an established custom or usage on the part of the carrier to carry merchandise of samples belonging to passengers and packed in trunks, or valises, or bundles, as baggage."

I do not think the evidence authorized this charge. There was no claim or pretense that this merchandise belonged to McGrew, and the custom or usage, to be effective, must be one to carry the merchandise of other persons not passengers, for the baggage of the passenger thus checking the baggage. The evidence was clear and uncontradicted that the merchandise sued for was not McGrew's, but was that of Aiken, Lambert & Co., for which, if carried, the defendant was entitled to freight money, and McGrew's representing it to be his baggage, was a fraud upon the defendants, and falls within the rule stated in several of the cases cited in the first pages of this brief.

Dunlap v. *The Int. St. Bt. Co.*, 98 Mass., 378.
Alling v. *Boston & Albany R. R. Co.*, 126 Mass., 130
Mich. Central R. R. Co. v. *Carrow*, 73 Ill., 350.
Cahill v. *L. & N. W. R. R. Co.*, 10 C. B. N. S., 172.

In another part of the charge the Court told the jury that it was immaterial that the merchandise did not belong to McGrew. *Pr. Rec.*, pp. 35 and 40.

Well, then, McGrew may have had jewelry belonging to a half a dozen different persons, and the defendant, though it had no knowledge of such persons, had made no contract with them, and was entitled to freight for their goods, if carried, was liable to each one of these parties for the value of the goods. This, we insist, is inconsistent with common fairness in business matters, and is not sustained by the law relating to common carriers.

In reference to this charge see, specially, the case of *Dunlap* v. *International Steamboat Company*, 98 Mass., 379; *see this brief*, p. 13.

In this connection the Court is referred to charges 11 and 13, refused. *See this brief*, p. 40.

They throw light upon this subject and lead one to ask, what will become of the rules of law on this subject, if persons authorized to check baggage simply, can ship merchandise of others not passengers, as baggage, and thus deprive the carrier of his right to freight money, and put upon him a liability to perils wholly unknown to him, and with persons with whom he had no contract, and to an amount of which he had no conception?

See *Mich. Cent. R. R. Co.* v. *Carrow*, 73 Ill., 350, 357.

The defendant also excepted to the following, taken from the general charge:

"But I think, and so charge you, that if the evidence establishes to your satisfaction that the defendant was in the habit of receiving, and it was its custom to receive and check trunks containing merchandise and transport them in its baggage-cars, it devolves upon the defendant to prove that it received extra compensation therefor, because that is a fact peculiarly within the knowledge of the defendant." *Pr. Rec.*, p. 40.

By this charge, if the receiving or checking of merchandise in trunks in the baggage cars, though it was paid for, and knowingly carrying it as freight, would render them responsible for the carriage of the jewelry in question free of charge, and of which they had no notice.

This charge proceeds upon a theory false as to this case. Custom and usage are often considered where

the question of neglect is involved. They also, sometimes, come in play to qualify rights secured by contract.

When offered for the latter purpose, they must be general, uniform, notorious, reasonable and consistent with the rules of law, and they must meet all the features in such a case. 1 *Duer on Ins.*, p. 278; *see this brief*, p. 49.

If it had been shown that it was not only a custom of that kind, but that carriers recognized their liability for the loss of merchandise so carried, and that such custom or usage had existed so long as to become notorious among shippers and carriers engaged in the business, then there would have been more ground for such claim. There was no such evidence.

Suppose it was proven that goods were so carried, what was there to show that the parties did not understand that they were carried at the owners' risk, being goods carried without compensation? See

Cahill v. *G. W. R. W. Co.*, 19 Com. B. N. S., 157.
Blanchard v. *Isaacs*, 3 Barn., 388, 389.

Nor do I think the burden was upon the carrier, as stated in this general charge. It was the plaintiff's duty to show his right to recover for this loss.

Nor was there any fair proof of the custom of the railroad to carry drummers' trunks containing merchandise without compensation,—much less of any right to do so. It is true one or two drummers swore to it and one of the discharged agents of the road.

Nor did the evidence as to custom meet the case.

It was not shown by any evidence that carriers were in the habit of carrying merchandise, not that of a passenger, as baggage, or that they did it without any knowledge of the kind of merchandise, its amount, value or ownership, and the custom cannot therefore be received to control the case.

The fact is the evidence showed the impropriety of any such rule and the constant deception practiced by these traveling agents, called drummers, in getting their merchandise in the nature of express goods, carried for nothing. *Pr. Rec.*, p. 73.

There was no proof in reference to the custom that should have been submitted to the jury.

There was the testimony of McGrew, who had made three or four single trips over the road. He swore that it was the custom of the defendant to check traveling salesmen's trunks as ordinary baggage.

The testimony of Michael G. Schwab, who lost some express goods by the fire, was also taken. He swore that he always had his trunk containing jewelry shipped and checked as baggage, but did not say that he informed the checking agent of the railroads that it contained merchandise, nor did McGrew give such information. Schwab speaks of comparing notes with fellow salesmen as to the cheapness with which they got off their extra baggage at their hotels. *Pr. Rec.*, pp. 55 and 56.

Then there was a conductor no longer on the road who swore that he could generally tell a drummer's trunk, but that sometimes he could not, for

"They got to charging extra baggage, and then they would

use the other kind of trunks to get out of paying extra baggage and beating the road." *Pr. Rec.*, p. 73

He does not testify that the company shipped merchandise or baggage for persons not passengers, free of charge.

Madden, the baggage-master, was examined as to the fire, and is asked by the plaintiff, if he did not know "a sample trunk" when he saw one, his reply was

"Yes, sir. There are some of them very heavy and some of them that you cannot tell from any other trunk. There are some parties that carry sample trunks that you cannot tell whether they are sample trunks or not." *Pr. Rec.*, p. 95.

He was not examined as to any usuge or custom of carrying trunks or baggage, containing merchandise or valuable goods, free of charge, for parties not passengers. He simply says that he generally knew a sample trunk, but sometimes did not.

Cook, an extensive trunk maker and dealer in trunks, was examined. He swore:

"That the outward appearance of drummers' trunks is very indefinite,—of late years we have been building sample trunks in similarity to regular traveling trunks, which in former years had been made a specialty. We have sold sample trunks for general use as well as for commercial men, and have had sample trunks ordered to compare with those used by the general traveling community, to make them so appear. It has been the request of the drummers to have them made in that way, to have them cut down smaller than they formerly were so as to give the same appearance as general traveling trunks, and in many instances it would be hard to detect them from outside appearances." *Pr. Rec.*, p. 84.

He also said that:

"They had built a great many trunks for general traveling

purposes with the same amount of strength as we would put in a jeweler's trunk." *Pr. Rec.*, p. 86.

The testimony of Cook, of Madden, and of the conductor, thus quoted from, was not disputed.

This deception in the drummer's trunk, for the purpose of evading the payment of freight for the carriage of goods, is what might be expected, and would be still greater if the rule of law contended for by the defendant in error was to prevail.

This testimony is before the Court on the charge asked, that the verdict should be for the defendant, and also upon the question of custom or usage.

There was no evidence in reference to such a custom that should have been submitted to the jury, not simply because the evidence offered does not come up to the custom required, but because it is so small in amount and so loose in character as not to entitle the plaintiff to a verdict.

A custom or usage affecting contracts and the rights of parties thereunder, must be not only general, uniform, notorious, reasonable, and to a certain extent consistent with the rules of law, but for the reason that a custom is likely to be misinterpreted by a jury, and generally presents a question of law, it is submitted to a jury with great caution, and generally under a positive charge as to their verdict.

Mr. Duer, in his work on insurance, has presented this subject of custom and usage more fully and accurately than any author I am acquainted with.

I quote from his work:

"It is a necessary result of an attentive consideration of the essential qualities of a valid usage, that, when the evidence is conflicting and various, the usage can seldom, with justice, be admitted, or established; and it will appear upon further consideration, that, in many such cases, where the witnesses are admitted to be equally credible, and the facts proved by all, to be equally true, the question of the existence of the usage, unless under special instructions, ought not to be submitted, at all, to the decision of the jury. A usage, clothed with all the attributes that the law requires, generally, if not universally, is a conclusion from the evidence, not its immediate subject. The acts, by the number and succession of which the usage is created, are the proper subject of direct proof; the existence of the usage, of inference, merely. Hence, when witnesses are produced on both sides, and the facts sworn to by all, are admitted to be true, the evidence is not contradictory, in the proper sense of the term, and, therefore, necessary to be submitted to the jury; but the only real question that it raises, is, in its own nature, a question of law. The instances of the observance of the usage, that are proved by the witnesses called to support it, may be so repeated and numerous, as fully to justify the belief of its legal existence; yet, admitting all these instances to have occurred, the conclusion drawn from them, may be wholly erroneous, and the facts proved by the opposing witnesses, even when much fewer in number, may yet be conclusive, to show, that the pretended usage is neither *general*, *uniform*, or *notorious*. Now the generality, the uniformity, and the notoriety of a usage, when the facts are undisputed, or admitted, are certainly questions of law; (a) and, hence, the intelligent judge, in the case I have supposed, instead of submitting the cause to the jury, as one of contradictory evidence, upon the force and effect of which, they alone have the right to decide, will instruct them positively, that, if they believe the facts, stated by the witnesses against the usage, they must find, that it has not been established." 1 *Duer on Ins.*, pp. 277. 278 and 279.

The evidence to support the usage is insufficient in amount, does not fully present the usage claimed and is very much of it incompetent. The usage, so far as

there is any proof of it, is neither uniform, general, notorious, reasonable or consistent with the rules of law, and the evidence does not present a single element of a valid usage. The facts proven by Cook and others defeat the proof of any custom or usage. The charge of the Court in relation thereto should not therefore have been given.

The Court in its general charge uses this language:

"I think proof of the fact that a railway carrier habitually receives and checks and transports in its baggage-cars trunks known by it to contain merchandise makes out a *prima facie* proof of custom, and that if the carrier relies upon the fact that it carries them as freight for hire it must establish that fact by evidence." Pr. Rec., p. 35.

Is that true of parties situated as these were and as to the trunks shipped as baggage, and where the carrier had no knowledge of their contents, and where it was admitted that the passenger shipping it had no interest in it and paid nothing for its carriage?

In reference to this passage, see cases quoted from on pages 12 to 26 of this brief.

This charge does not take into consideration whether the property thus shipped was owned by the passenger or others, but made the simple shipment of trunks of merchandise in the baggage cars, proof of custom unless the carrier showed that it was shipped as freight for hire.

In connection with the proof of custom the Court charged:

"The rule making it the duty of the carrier to transport with the passenger only his personal baggage is for the protection of the carrier. If, therefore, the carrier chooses to waive that limi-

tation and to accept and treat as baggage samples of merchandise, it may do so, and if it do so, it is liable for the samples as if they were baggage, and this waiver may be evidenced not only by proof of waiver in the particular case, but by proof that the carrier has by its custom or usage established that waiver as a general waiver applicable to the general traveling public or to a particular class of travelers, as drummers—that is, men whose business it is to solicit custom and who generally sell by sample." *Pr. Rec*, p. 34.

Taking this in connection with that part of the general charge above quoted, and the jury must have received the impression that if the carrier transferred merchandise in trunks, in its baggage cars, they waived the claim that they were not liable for merchandise thus checked as baggage, and when they had no knowledge of the character of the goods carried by them, and that a custom of this kind gave a general license to the public to forward in trunks as baggage jewelry and valuable property free of charge, and to hold the carrier liable therefor.

Such a custom, if proven, would not stand the test of a legal usage binding the parties.

The attention of the Court, in relation to the general charge, is called to the fact that the petition does not set out anything in reference to the custom, or anything as to the size, weight or the character of this trunk. It simply alleges that the jewelry sued for was "contained in what is known and recognized as a sample trunk."

The answer has the following allegation:

"The defendant further admits, that just previous to boarding said train, said McGrew shipped a trunk, but not a large one, as baggage, but as to the contents of which the defendants' agent

had no knowledge and supposed the said trunk to contain the personal baggage or effects of said McGrew, and defendant denies that it had any knowledge that said trunk was one of such trunks as are used for samples in the jewelry trade."

There was no reply, and the above facts are therefore admitted of record, even the last branch of the sentence, as the petition did not charge that the defendant or their agents knew that the trunk was such a trunk as was usually or generally used as sample trunks. The allegation is that the watches and jewelry "were contained in what is known and recognized as sample trunks."

Known and recognized by whom? It is not averred that defendant's agents knew, nor does it state any facts which show that he ought to know it.

The case at the time judgment was finally rendered depended wholly upon the finding of custom by the jury, and a custom not broad enough to meet the case, and founded upon insufficient evidence. That this is so, appears from the fact that the Court charged the jury that the defendant would not be liable for the want of ordinary care, or unless he was guilty of gross neglect. This charge, I think, led the jury to strain the point as to gross neglect that they might find a general verdict for the plaintiff. The Court set this finding aside, so that, as the judgment was rendered, the question of the degree of care was not in the case. The judgment must therefore rest upon the custom or usage as in special finding No. 3, *Pr. Rec.*, p. 21, and in the general charge. See *Pr. Rec.*, pp. 34, 35.

As stated before, this custom was not broad enough

to meet the case, as it did not include the idea that the baggage belonged to others than the drummer. And the evidence of the custom attempted to be proved was not of a character that should have been submitted to the jury. 1 *Duer on Ins.*, pp. 278, 279.

The charge of the Court is not altogether clear or free from apparent repetition. The judgment, however, must have been entered upon the special finding No. 3, which does not meet all the features of the case, and was not supported by sufficient evidence, as has been stated.

IV.

EXCEPTIONS TAKEN TO THE ADMISSION OF EVIDENCE.

The following evidence was objected to and exceptions taken to its admission. I present it as throwing light upon the custom and the proof of negligence.

McGrew testified:

First. "It was what was known as a jeweler's trunk, and baggagemen are usually able to judge of its contents from its shape and style." *Pr. Rec.*, p. 24.

Was this competent? What right had he to give an opinion as to what baggage-men could judge?

Second. Q. 6. "State whether or not, upon these trips before the loss of the jewelry the trunk and valise mentioned were received and checked as baggage?"

A. "They were." *Pr. Rec*, p. 24.

How could a previous fraudulent shipment of this trunk and valise throw any light upon the matter in con-

troversy? What was said or under what circumstances this receiving of the trunk and valise were made on former occasions, whether it was represented to be baggage, what it weighed, or what the checking agent knew of it, does not appear. For this testimony see *Pr. Rec.*, p. 40.

Third. Q. "State whether or not you know any thing touching the custom of the defendant at the time of and before the loss by fire as to carrying of trunks of traveling salesmen as baggage?"

A. It was their custom to check such trunks as ordinary baggage. *Pr. Rec.*, pp. 24–51.

This was objected to because 1st, the custom of proving it was not competent in this case; and 2nd, because this witness had not shown that he was qualified to testify to such fact. He had only traveled over the road three or four single trips, *Pr. Rec.*, pp. 49, 51, and had not sufficient knowledge to testify as to the custom of the railroad company.

Abraham G. Schwab was also examined, and this question was asked him and the following answer given:

Fourth. Q. "Where and by whom are most or all of these jewelry—sample trunks made, and what similarity is there between them, and are they readily distinguishable from other trunks used by traveling salesmen?"

A. "Most of them are made by Crouch and Fitzgerald, of New York, and have been for several years; they are generally covered with black leather and bound heavily with iron, and they are generally about the same size, or very near the same size. I should think they are readily distinguishable. If I should see a jewelry trunk I could tell it at once." *Pr. Rec.*, p. 24.

The question before the jury related to the trunk destroyed and not to jeweler's trunks generally. And

is this part of the question competent? "I should think they are readily distinguishable. *If I should see a jeweler's trunk, I could tell it at once.*" *Pr. Rec.*, 52. Traveling jewelers skilled in this kind of fraudulent shipment of baggage might distinguish such trunks, or think he could, whereas a checking agent might not, when he was told that it was baggage.

Fifth. "Are they readily distinguishable from hardware traveling trunks?"

A. "I am not quite sure what a hardware trunk looks like. I couldn't tell a hardware trunk if I should see it—that is for sure. I don't know in what shape trunk hardware men generally carry their samples, but I do know a jewelry trunk." *Pr. Rec*, p 25.

The question was objected to and the last sentence of the answer, to-wit: "but I know a jewelry trunk." How could this be competent in proof of custom or any thing else. See the evidence, *Pr. Rec.*, p. 55.

This witness is also asked:

Sixth. "How familiar are the baggage and train men in the employ of the defendant with sample jewelry trunks, and state how you know that they had any knowledge of them, referring now on the date of December 10th, 1880 and previously?"

A. "Well, I should think the baggage-master could tell a jewelry trunk at once; most baggage-men knew my trunks, and knew there was jewelry in them." *Pr. Rec.*, p. 25.

Here he gives his opinion as to a matter of which he could have no positive knowledge, and he bases his answer "most baggage-men know my trunks, and knew there was jewelry in them" upon opinion only. This last statement is evidently but his judgment, and was otherwise incompetent.

This witness was also asked:

Seventh. *Q.* "Please answer the last part of my question," referring to the question last above copied.

He answered: "The jewelry trunks are generally unusually heavy, and the baggage-master who would take hold of them would say: 'Hello, what you got in there, jewelry?' which I couldn't deny if they would ask me that question" *Pr. Rec.*, p. 25.

Is such evidence competent in a matter as important as this?

This answer shows that the trunk was one of those manufactured to deceive the carrier. *See Cook's Ev., Pr. Rec.*, p. 84; copied in this brief, p. 47.

This witness is also asked:

Eighth. *Q.* "State whether or not your sample trunks were received and checked as baggage by the defendant company when you took them with you?"

A. "I always had them checked as baggage" *Pr. Rec.*, p. 25.

The size and weight of his trunks is not given, or how much he had in them, and whether he paid anything or not for their carriage. All that appears is that he had them checked as baggage. See, in this regard, quotations in this brief on pages 12 to 26.

The plaintiff examined a discharged brakeman, Duff, who was asked the following question and made the following answer, to which objections were made and exceptions taken to the overruling the objection.

The plaintiff's counsel asked the witness:

Ninth. *Q.* "Are these sample trunks easily distinguished from the ordinary traveling trunks?"

A. "Yes, sir; I think they are always made a little heavier, and you can tell them unless there are some parties traveling that made his trunks a little heavier to protect his goods." *Pr. Rec.*, p. 26.

The question is not confined to the carrying of jewelry.

Tenth. The plaintiff asked the following questions and received the answers below, to each of which objection was made and exceptions taken to the answer.

Q. "Do commercial travelers or drummers frequently or at all travel over that line of railway?

A. Yes.

Q. Do you know the character of the trunks that are usually carried by drummers?

A. Yes, I know the character of them.

Q. Are they constructed differently from ordinary traveling trunks?

A. Yes, sir.

Q. And by reason of their construction you could generally distinguish the drummers' trunks?

A. Yes, sir; sometimes you could not, but as a general thing you could. They got to charging them for extra baggage, and then they would use the other kind of trunks to get out of paying for the extra baggage and beating the road. As a general thing, those that did not get onto that, used the old style." *Pr. Rec.*, pp. 26, 27.

The first of these questions relates to the general character of drummer's trunks. That does not reach or meet the case, and there is no evidence that McGrew's trunks was "a drummer's trunk."

As to the second of the questions: Suppose he could tell drummer's trunks by their appearance,—that does not prove or tend to prove that the defendant's agent could do it, not being in the business or its secrets, or that checking agents generally could tell them by their appearance. His knowledge upon these trunks may have been much greater than that of checking agents of railroads generally.

He says that they are constructed differently from ordinary traveler's trunks, and for that reason he could *generally* distinguish drummer's trunks.

The plaintiff in error in this case has nothing to do with drummer's trunks generally—the question relates to McGrew's trunk and what was said and done when it was checked by the omnibus driver. See *Special Charge asked*, this brief, p. 39.

Now look at the fourth of these questions and answers:

"He could *generally* distinguish drummers' trunks, but sometimes he could not, for they got to changing to avoid the paying of any extra compensation for baggage."

The plaintiff below also examined the baggage-master of the train, and asked him this question:

Eleventh. Q. "Have you not been in the habit of carrying on every trip or on almost every trip more or less sample trunks?"

He answered: "Yes, sir; plenty of them."

This question and answer were objected to generally and specially, because the testimony did not relate to such trunks as the salesmen handling jewelry generally carried.

It is to be borne in mind that Madden, the baggage-master, did not check this baggage. See *McGrew's Ev., Pr. Rec.*, p. 46.

I am inclined to the belief that the man who has charge of the baggage on board the train does not generally check the baggage. We know he does not in all cases, as there are many cases where the baggage is checked at the hotels or houses of the passengers.

I have gone over these exceptions to the evidence to show the character of the evidence by which the plaintiff, at the trial, endeavored to prove a custom and gross neglect.

It shows the general character of the evidence, and how wanting it is in all the elements to prove a valid legal custom which could control the rights of the plaintiff in error, or which could prove gross neglect. It shows the dangerous nature of the custom and the unreasonableness of holding the carrier liable for such valuable goods without any compensation.

CONCLUSION.

This case is one of great interest and importance to shippers and carriers in the present condition of the authorities. The amount involved is considerable, being with the costs over $8,000, but is small when compared with daily shipments of goods of this character. If the rule contended for by the defendant in error is to prevail, the amount of valuable goods of this kind packed in sample or drummers' trunks of which the carrier has no knowledge will greatly increase, and the business of express carriers greatly decrease, the responsibility thereof being thrown upon the carrier without compensation. It is believed that the principles declared by the Circuit Court are inconsistent with the well settled rules of law relating to common carriers, and that the attempt to control this case by custom was in direct disregard of the rules relating to the proof of usage in such

a case, and that the evidence of custom was too loose and uncertain to be submitted to a jury.

Certainly it is unreasonable to impose upon the carrier a liability to this extent of which he has no knowledge when his contract with the passenger is made, or to permit a practice of the subordinate agents of carriers to impose such risks upon them without any compensation therefor. Such a usage if proven could not stand. It is unreasonable and inconsistent with the well and long established rules of law. And it was not proven with the necessary requisites required by the rules of evidence relating to the proof of usage.

It would necessarily in every case lead to an inquiry as to the contents of trunks, which would cause disputes between passenger and carrier, and be dangerous to both of them. See cases cited on pp. 12 to 21 of this brief.

It would lead to gross frauds upon the carrier.

The public at large is interested in this question, for in the end they must pay for such shipments an increased price for the carriage of their merchandise and for their passage tickets.

The rules of law relating to carriers are very stringent. They place a heavy liability upon them, and many attempts have been made to modify them as unnecessary at this time. The writer of this brief believes that the same stringent liability is as necessary now as it was in 1703, when Ch. J. Holt decided *Coggs* v. *Bernard.*

While the law imposes this great liability upon the carrier, it at the same time gives him fair play. It gives him compensation for his liability; it gives him knowledge of what his liability is; it protects him against fraud and imposition such as was practiced upon the plaintiff in error in this case, by presenting the trunk in question as the passenger's baggage. (See cases quoted from on pages 12 to 26 of this brief.) It throws the risk upon the passenger who shipped such property as his personal baggage, or requires him to declare what it is and to pay a proper compensation for the increased liability of carrying such property.

As is stated by Ch. J. Erle in *Cahill* v. *L. & N. W. Railway Co.* (this brief, p. 20.):

> "It would be a most pernicious rule, to hold, that if a package which from its appearance is likely to contain merchandise, is brought to a railway by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood as personal luggage or merchandise at the peril of being held liable for loss, if loss occurred.,'

It is easy to see that a passenger might not desire to inform the checking agent or baggage-master of the contents of his trunk, and that such an inquiry might not only lead to distrust and even to quarrel between them, but be dangerous to the property of the passenger. It is not best that a checking agent or a baggage master should know what the trunks of passengers in their charge contain.

The injustice, unfairness and illegality of the rule declared by the Circuit Court has been seen and declar-

ed by many distinguished judges in this country and in England, as the authorities cited show.

It is because of the importance of the questions involved in this case to the carrier and the traveling public, and the position of the cases bearing upon it, that I have been led to present the question and the authorities so fully. I have not cited all that favor the plaintiff in error, as that would make this brief too long, but those which I have cited and quoted from are from the highest and most reliable tribunals of this country and of England.

They apply directly to the questions now involved in this case, and are worthy to be followed by this Court.

All of which is respectfully submitted.

T. D. LINCOLN,

Of Counsel for the Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1888.

The Louisville, Cincinnati and Lexington Railway Company,

No. 111. PLAINTIFF IN ERROR,

VS.

The Switzerland Marine Insurance Co.,

DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division.

REPLY.

I have this 1st of December, in the afternoon, first seen the brief of the defendant in error.

He refers to several cases which were not referred to by me in my brief. When carefully examined, I do not think they meet the case. Among them is the case of *Waldron* v. *The C. & N. W. R. R. Co.*, 1 Dakota, 357 and 362.

This was a case where the plaintiff purchased tickets for himself, his son and two daughters, to be carried from Belle Plain to Missouri Valley Junction. He presented, as his baggage, three trunks and two small boxes, one of which contained a few family photographs and some other articles, was of rough board, and

had nothing to which a check could be attached, and this trunk, while received as baggage, was not checked, but was finally placed in the baggage car. The checking agent was informed of the contents of the box and had one of the photographs given him. Among other things, showing that this case does not make one against the plaintiff in error, the Court finds:

"Between the places named, the company was, at the time, a common carrier over its road, not merely of passengers and their baggage, but also of articles of freight to be transported in its baggage cars, when such articles were accompanied by a passenger. And such passenger was chargeable with additional compensation whenever demanded of him. In this case the agent of the company, before accepting the box, made no suggestion or demand of that nature." 1 *Dakota*, 357 and 358.

This shows that goods are sometimes carried in the baggage car, the party owning them being a passenger. They are, nevertheless, carried not as baggage but as freight.

Again the Court say:

"A rough pine box, such as is used for merchandise, was presented for transportation and exposed to the view of the proper agent; it was of small dimensions, and of a kind rarely, if ever, used for packing wearing apparel. If it was not properly baggage it was a package of freight to go with the passengers. The property in the box was evidently not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal." 1 *Dakota*, 358.

Again:

"There was no allegation or pretence that the plaintiff was endeavoring to practice a fraud on the company. He made no misrepresentations, and was not asked as to the contents or value. The box contained neither merchandise nor samples of merchandise; neither money nor jewelry, nor other valuables." 1 *Dakota*, 361 and 362.

Finally, the Court say:

"With the box, the same evening, opened and its contents made known, and with a full right still to demand and exact freightage, if it was not strictly baggage; with the agent actually receiving a photograph of one of the plaintiff's daughters, as a gift from a person known not to be the owner, but who was desirous to obtain possession of the property; with all this, the company saw fit to deliver it to a wrongful claimant, and wound up the transaction by checking it for him, as baggage, to State Center." 1 *Dakota*, 362.

There is clearly nothing in this case which can favor the contention of the defendant in error.

Nor does the case of *Hellman* v. *Holladay*, help the defendant in error. It is on the contrary when carefully examined a case for the plaintiff in error.

"The defendant was the proprietor of a line of stages and of a treasure express, running from Great Salt Lake in Utah *via* Denver in Colorado, to Omaha in Nebraska. Cahn took passage at Salt Lake for Omaha, and paid the usual fare, being $500; and having a quantity of gold dust, the defendant undertook to carry that for $5 per $1,000 extra, which said Cahn then and there paid. Near Fort Bridger this gold dust was lost off the coach, by reason of the unskillful driving of the coach by the defendant's driver, who became intoxicated; and also because the gold dust was placed in the boot of the coach and not there properly secured." 1 *Woolworth's Ct. C. R.*, 366.

The defendant here was not only a carrier of passengers and their baggage but of valuables of this kind for hire.

Further on the case shows that Cahn, the partner of the plaintiff,

"Introduced the gold dust in to the coach surreptitiously, and paid for it as extra baggage, without informing the defendant's agents, and without their knowing that it was valuable; that Cahn placed his baggage in the boot of the coach, and gave to

the driver the liquor by which he was intoxicated" 1 *Woolworth*, 367.

The plaintiff afterward introduced evidence tending to show that the superintendent was afterward told that it was gold dust, and he placed it in a carpet-bag in presence of the superintendent of the road, and the driver placed it in the boot.

The defendant introduced evidence tending strongly to show

"That the gold dust was surreptitiously and fraudulently introduced into the coach by Cahn at Salt Lake; that his agents neither there nor at Millersville knew his baggage contained articles of such value; and that he or his companions, with his assent and even encouragement, gave to the driver the liquor which he drank; and that he placed the carpet sack in the boot of the coach, or caused the driver to place it there, without knowing its contents." 1 *Woolworth*, 368

The Court was asked to make a certain charge, which it refused, because it ignored certain evidence before the jury. The Court say:

"The testimony which I refer to as not taken account of in the request is, that of the plaintiff tending to show that when the payment was made as for extra baggage, the defendant's agents knew that the carpet sack contained gold dust, and knowing that fact, charged for it only the rates usual for extra baggage.

"I agree with the defendant's counsel that if Cahn introduced the gold into the coach secretly at Salt Lake, and attempted to get it carried for nothing, he was guilty of a gross fraud. If that were the whole of the case, he could not recover here." 1 *Woolworth*, 369

In this case the Court do say:

"If the carrier knew that the carpet sack contained the gold, and took not the usual rates chargeable for gold, but only such as were chargeable for ordinary extra baggage, then he was not defrauded." 1 *Woolworth*, 370.

That shipment was finally made, not by a driver of the coach, or a subordinate agent, but by the superintendent of the stage company. The last quotation, as applicable to such a case, is probably true; whether it can be made general, and apply to all cases, is a very different question, which it is not important here to determine. The case at bar shows a shipment of the trunk as ordinary baggage, and the jury found that

"The checking agent when he checked the trunk had no notice that it contained jewelry, or property other than the personal baggage of McGrew." *Pr. Rec.*, p. 6.

The trunk, also, was a medium sized trunk. *Pr. Rec.*, p. 42.

In *Hager* v. *Railroad Co.*, 63 Wis., 100, one Dilg, the traveling agent of the plaintiff, applied to defendant to have his trunks, containing samples of goods sold by him for plaintiff, checked in the usual and ordinary way in which baggage is checked for transfer, which was done. The trunks weighed more than the amount of baggage allowed the passenger free of charge, which excess he was to pay at the end of the trip. The trunks were safely taken to the end of the trip and there placed in the baggage-room of the defendants. Having carried the trunks to the end of the journey and placed them in the baggage-room, the carrier was held to have performed the contract and not to be liable for loss by fire. As the defendants had notice of the contents of the trunks, and checked them as baggage, the Court say that it would be estopped from denying that they were

baggage. Extra compensation was due and payable in that case.

The case of *Phister* v. *Central Pacific R. R. Co.*, 70 Cal., is referred to. That case is favorable to the plaintiff in error. The plaintiff there sued the railroad company for $50,000 for refusing to permit him, with his three assistants, as passengers, all having passenger tickets, to ride upon their passenger trains, or any of the cars, with their satchels, containing $91,952 of gold dust in their possesslon and under their control, and requiring as a condition to their going upon the train with them, that they ship them through Wells, Fargo & Co., which they did at an expense of $68.95. The railroad company had a contract with Wells, Fargo & Company, entitling the latter company to receive and carry all such express goods. The plaintiff proposed to go with his assistants in the baggage car or any other car of the train with his satchels, and pay the defendant any charges which might be exacted for the transportation of them. This was refused. The Court say:

"He purchased four first-class passenger tickets from San Jose to Sacramento, which entitled him and his three employes to transportation in the first-class passenger coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding one hundred pounds to each person, transported at the same time free of charge.

"It gave to them no right to travel in a baggage, express or freight car, but in the regular passenger car or cars of the defendant, and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise, or property not included in the term "luggage." 70 *Cal.*, 174.

Further on the Court say:

"The fact that for ten years the defendant had permitted the county treasurers of Santa Clara County to carry with them upon its passenger trains the money which they were by law required to pay over to the state treasurer, neither enlarged nor abridged the contract between it and plaintiff." 70 *Cal.*, 175.

This shows that custom does not control such a law.

Still further on the Court say:

"Railroad companies are not bound as carriers of property to receive and carry money, gold or silver bullion, bonds, bank notes, jewelry, valuable papers, or other property not appropriate to the mode of transportation in vogue by such companies." 70 *Cal*, 180.

The above is still more forcibly expressed in the *Southern Ex. Co.* v. *Nashville Ry. Co.*, 20 Am. Law Reg., 590.

The fact is the business of carrying jewelry and such valuable articles as were in McGrew's trunk is the business of express companies who receive greater compensation than railroad companies for the carriage of ordinary freight or mere baggage, and the responsibility of it cannot be forced upon railroad companies without compensation, by a usage such as was attempted to be proved in this case.

The case of *Lake Shore and Michigan Railroad Co.* v. *Foster*, 104 Ind., 293, can have no unfavorable effect upon the case of the plaintiff in error. The articles for which suit was brought in that case were shipped in a small trunk, were few in number and small in value, and were baggage pure and simple. The authority of the baggagemen was not in that regard extended be-

yond its ordinary scope. The liability of the carrier was not enlarged by the shipment of goods not authorized to be sent as baggage.

There are some remarks as to the effect of a demurrer to the evidence in that case and the condition on which it was held to apply, but they can have no place in this discussion, as ours is not a demurrer to the evidence, and the rule which we invoke has a broader scope.

There are many other cases referred to by the learned counsel for the defendant in error, but when examined there will be found no case that meets the one before the Court in all its essential facts. Some of them here and there have expressions seeming to aid him, but when carefully scanned they will be seen to be as much in favor of the plaintiff in error as the defendant in error. Many of them refer to the carrying of mere baggage; others as to what might be debatable as the tent and poles of a surveying party. Some of them are cases where the contract was in reality not one for the carriage of baggage, but for the carriage of freight for compensation; others are cases where the doctrine of estoppel would justly apply, and where that doctrine was in fact applied. There are many very debatable or exceptional cases. It would, in fact, be an exceedingly difficult thing to classify them. Many of them ought to be swept out of the way as inconsistent with a fair business transaction, and a practical fraud upon the carrier. The public is no doubt interested in

sustaining the stringent rules relating to common carriers. At the same time the public is equally interested that the carrier be treated fairly and honestly in such transactions, and that no large amount of property be carried without compensation; that no extended and unfair responsibility be put upon him. The carrier to serve the public faithfully must receive due compensation and a fair profit. The honest public that ships its goods has to pay for the dishonest persons who endeavor to impose heavy liability of the kind embraced in the case in hand without compensation.

In view of the many cases decided, it is time for this Court to adopt some honest rule that, while sustaining the stringent doctrine relating to common carries, will, at the same time, give them the protection under which alone they can faithfully serve the public; a rule that will secure to them a reasonable compensation and discountenance trickery and fraud.

The question involved in this case, as I have stated, has received a decision favorable to the plaintiff in error a number of times in this country and in England, as the cases cited in my brief show. But no case precisely in point can be found that meets the case sought to be made by the defendant in error. The case in hand is simply this: The trunk of McGrew was a medium sized trunk. *Pr. Rec.*, p. 42. It could not have weighed over 150 pounds, as he was not charged anything for extra baggage. It was shipped as McGrew's baggage, and so checked. The party checking it did

not know the contents. *Pr. Rec.*, pp. 21, 45. McGrew had no interest in the trunk or jewelry contained in it. *Pr. Rec.*, p. 49. He never made any claim for the loss of it, as he had no interest in it. *Pr. Rec.*, p. 48.

He was personally interested in the contract he made, inasmuch as his transportation to Louisville, the security of his person during the trip and that of his valise and clothing were protected by it. The valise and clothing were his own, and he was paid for their loss by the railroad company. *Pr. Rec.*, p. 50.

Now, can it be that there were two contracts involved in the purchase of the passenger ticket by McGrew —one in favor of himself, in which Aiken, Lambert & Co. had no interest, that for his personal safety and the safety of his effects, and another in favor of Aiken, Lambert & Co., for the trunk and jewelry in question? If so, why could he not have carried jewelry for others in his trunk, as is stated in the brief, page 43?

I insist that no case of that kind can be found, and that a responsibility can not be raised from the pretended custom of drummers in shipping their trunks free. But I have said in the brief all I desire to say upon this point, and only write this as a reply to the brief of defendants in error.

I raise no question as to some of the points presented by the learned counsel.

Respectfully submitted,

T. D. Lincoln,

Of Counsel.

FILED.
DEC 5 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

The Louisville, Cincinnati & Lexington Railway Co.,

PLAINTIFF IN ERROR,

— against —

The Switzerland Marine Insurance Co.,

DEFENDANT IN ERROR.

Brief for Defendant in Error.

C. B. MATTHEWS,
Counsel for Defendant in Error.

1888:
GEO. R. TOPP, Law Printer.
CINCINNATI, O.

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Brief for Defendant in Error.

The action below was brought to recover a claim for lost baggage. The petition alleges that on the 10th day of December, 1880, one C. G. Megrue, who was a traveling agent for the firm of Aiken, Lambert & Co. of New York City, became a passenger on one of the trains of the defendant, bound for Louisville; that he purchased a first-class ticket and that he had checked by the defendant as his baggage a certain trunk belonging to Aiken, Lambert & Co., containing jewelry samples of the value of about $6,000; that said trunk and also a valise containing his personal

baggage and other samples were received by the defendant as baggage on the said train and that the defendant undertook to carry them safely to the City of Louisville, but that through the negligence of the defendant, the baggage car and its contents, including the trunk and valise above specified, were consumed by fire. The plaintiff below was an insurer of said property under a policy which subrogated it to the rights of the insured and required the assignment of such claims. The claim in suit was assigned actually to the Insurance Company.

The answer was that the defendant received the trunk and valise, supposing them to be the personal baggage of the said C. G. Megrue and without any knowledge that they contained merchandise. It admits that the said Megrue became a passenger as alleged, and that it, said defendant, was a common carrier and that the trunk and valise were checked as baggage, but denies every other allegation of the petition, and, among other things, the negligence charged.

The case was removed to the Federal Court from the Superior Court of Cincinnati. After the case was removed to the United States Circuit Court, a motion was made to transfer the case to the equity calendar, on the ground that the plaintiff's title was equitable. The motion was granted, (See page 18 of the Record.) But afterwards, upon application of counsel, it was re-transferred to the law docket where it came on for hearing before a jury. The jury rendered a general verdict in favor of plaintiff, which is found at page 20 of the printed record, and a special verdict, found at page 21, in answer to certain questions put to them by the Court, which were as follows:

Q. 1. What was the value of the contents of the trunk destroyed, after deducting salvage? *A.* $4,955.63.

Q. 2. Did the checking agent have notice when he checked the trunk that it contained jewelry or property other than the personal baggage of Megrue? *A.* No.

If yea, was that notice conveyed by the appearance of the trunk or was it by any statement made to said agent? State which.

Which was not answered as it became immaterial in view of the previous answer.

Q. 3. At the time of the checking of said trunk, and prior thereto, was it the custom of the defendant to carry as baggage and without extra charge excepting on account of extra weight, drummers' trunks containing merchandise, knowing that they were drummers' trunks and that they contained merchandise? *A.* Yes.

Q. 4. Was the loss of said trunk occasioned by the gross negligence of the defendant? *A.* Yes.

Q. 5. Did the defendant exercise ordinary care as to the trunk which with its contents was lost? That is, such care as a prudent man would exercise in like circumstances with reference to his own property? *A.* No.

And afterwards the defendant filed a motion for a new trial, found at page 22 of the Record, for certain reasons therein specified, the fifth ground of which was, "There is not sufficient evidence to sustain the third, fourth and fifth findings, as to each of which the defendant moves to set them aside." The case came on upon the motion, which the Court overruled and rendered judgment upon the general verdict but set aside the fourth special finding.

The cause is now here on the bill of exceptions setting out all the evidence and a writ of error. The assignment of errors, found at page 117 of the Record, is as follows:

1. The Court erred in setting aside the entry transferring the case to the chancery docket and compelling the defendant to try the case before a jury.

2. That the Court erred in permitting evidence to go before the jury, objected to by the plaintiff in error, then defendant.

3. That the Court erred in excluding evidence offered by the plaintiff in error, then defendant, which was offered by the plaintiff.

4. That the Court erred in its general charge to the jury in the matters excepted to by the plaintiff in error, then defendant.

5. That the Court erred in refusing to charge the jury as requested by the plaintiff in error, then defendant.

6. That the Court erred in entering judgment upon the verdict and special findings against the plaintiff in error, then defendant.

7. That there are other errors in the proceedings and judgment of said Court in said cause prejudicial to the rights of the plaintiff in error.

ARGUMENT.

The first assignment of error is, "that the Court erred in setting aside the entry transferring the cause to the chancery docket and compelling the defendant to try the case before a jury."

The argument that the case was a chancery case is grounded on the claim that the title of the plaintiff was equitable, viz., by subrogation. This might be disposed of by the allegation of the petition that in pursuance of an express clause in the policy that upon payment of a loss the insured should assign the claim to the company. This is not an assignment in equity through the doctrine of subrogation,

but an actual assignment. It was alleged, in the petition that this assignment had been made, which was admitted, see printed record, page 27. In our view of the matter it is immaterial whether it was claimed by actual assignment or simply by subrogation.

Section 4993, of the Revised Statutes of the State of Ohio, provides that every suit shall be brought by the real party in interest. It is said, in the case of *Whitman et al. vs. Keith et al.*, 18 O. S., 134. at page 142, speaking of this provision:

"The general rule of the code, established by section 25, is that 'every action must be prosecuted in the name of the real party in interest,' and the only exceptions to that rule are to be found in section 27; and none of them relate to the case of assignments. But section 26 provides that 'in the case of an assignment of a thing in action the action by the assignee shall be without prejudice,' etc., clearly implying that the action is to be brought by the assignee. Where at common law, an assignment of a chose in action would pass only the equitable title, it is the policy of the code to vest in the assignee the legal title, and consequent right of action in his own name."

See also *Masury vs. Southworth*, 9 O. S., 340.

In the case of *Thompson vs. The Railroad Companies*, which came from the same Circuit Court, in 6 Wallace, at page 138, it is said in relation to a similar claim:

"But there was no necessity for a change from law to equity after the suit was transferred.

"The Railroad Companies mistook the course of proceeding in courts of the United States in actions at law, in suits brought up from State Courts. In this case, as the action was a purely legal one, if they could have maintained it in their names in the State Court, they had an equal right to maintain it in their names when it arrived in the Federal Court.

"In actions at law the Courts of the United States may proceed according to the forms of practice in the State Courts, and in such actions they administer the rules of

evidence as they find them administered in the State Courts. There was, therefore, no difficulty whatever in the plaintiffs in the State Court remaining plaintiffs on the record, and prosecuting their suit in the same manner they were authorized to prosecute it by the laws of the State. If, in Ohio, the drafts could have been received in evidence in a State Court, in a suit brought by the Railroad Companies against Thompson, then, on the transfer of the suit to the Federal Court, and trial had there, they would have been equally receivable in evidence. The law of Ohio directs that all suits shall be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the State Court, in conformity with it; and in all cases transferred from the State to the Federal Court, under the 12th section of the Judiciary Act, September 24, 1789, Chap. 20, this title will be recognized and preserved; and when a declaration is required by the rules of the Circuit Court, it may be filed in the name of the party who was the plaintiff in the State Court."

In this case drafts had been drawn by the Railroad Companies upon one Thompson payable to the order of one Robinson. Upon Thompson's failing to accept or pay them, they were handed back to the Railroad Companies, without Robinson's endorsement, apparently, and instead of suing upon them as the real party in interest, a bill in chancery was filed. This Court acceded to the proposition that the remedy was complete at law, and that the bill should have been dismissed, and the decree was accordingly so entered.

In *Hayward vs. Andrews*, 106 U. S., 672, and *New York Guaranty Company vs. Memphis Water Co.*, 107 U. S., 205, it is said, in the first case, that the assignee of a chose in action cannot proceed in equity to enforce for his own use the legal right of his assignor, merely upon the ground that he cannot maintain an action at law in his own name; and, in the second case, that an assignee of a chose in action or any other *cestui qui trust* cannot, merely because his inter-

est is an equitable one, proceed in a court of equity for the recovery of the demand, and, secondly, that the courts of the United States especially, in view of the act of Congress declaring that suits in equity shall not be sustained where plain, adequate and complete remedy may be had at law, should enforce this rule.

Under these decisions the plaintiff below would have had no right whatever to come into a court of equity. Its remedy under the common law would have been simply to enforce its rights through the use of the name of the assignor, and under the Ohio Statutes its only remedy would be to sue in its own name under the provision of the Revised Statutes above specified; for the object of that provision was to prevent suits in the name of nominal plaintiffs. It creates a legal title to sue, according to the 18th O. S., *supra*, which would be recognized and enforced by this Court according to the case in 6 Wall.

The second assignment of error related to certain evidence offered by the plaintiff below objected to by the defendant, which objections are contained in the bill of exceptions, commencing at page 23 and ending on page 27. The object of this evidence was to show that the sample trunks of jewelry salesmen were of peculiar construction and build, and so peculiar that their character and contents were discernible at once by anybody called upon to handle them. The object of this class of testimony was to show notice to the Railroad Company of the general character of the contents of the trunk.

The second class of testimony objected to was the testimony of the witnesses Megrue, Schwab, Griswold and Duff, tending to show the custom, extending over years, to

carry drummers' trunks as baggage without extra charge except for over-weight.

The third assignment is that the Court erred in excluding evidence offered by plaintiff in error.

The fourth was that the court erred in refusing to charge the jury that upon the evidence the plaintiff could not recover. The fifth and sixth related to alleged errors in declining to give special charges and in the general charge of the court to the jury. These special charges were grounded upon the theory that upon all the evidence and the law, the plaintiff had no right to recover; first, because Megrue had no interest in the goods, second, that the Railroad Company and its checking agent had no knowledge of the contents of the trunk. There were various other charges touching the standard by which knowledge of the defendant's agents should be gauged; the effect of the presence of an express messenger of the Adams Express Company, over which, as is alleged, the defendant below had no control, the negligence of the defendant, the authority of the checking agent, the burden of proof and the definition of gross negligence.

These objections to the testimony as well as the exceptions to the refusal of the court to charge as requested, and also the objections to the general charge, will best be disposed of together by a discussion of the general rules of law govering the rights of the parties under the circumstances.

In its general charge, the court substantially told the jury that the fact that Megrue was in charge of the trunk and that it was being carried as his baggage was not conclusive of the right to sue. It defined the obligations of a common carrier of baggage under its contract stipulation

with the passenger. It charged upon the subject of notice to the common carrier and measured the duties of the defendant by the following standard: that as a general rule the obligation of a common carrier was to carry the personal baggage, only, of the passenger. The court, at page 32 of the Record, uses the following language, summing up in a general way all of the law of the case as given to the jury by the court:

"These articles were not baggage, and the defendant is not liable for their loss until it is established, by a preponderance of the evidence in this case, that the defendant received and checked the trunk having been informed what its contents were, or, second, knew or is presumed to have known from the circumstances that the contents of the trunk were merchandise or, third, that it was the established custom or usage of the defendant to receive and transport as baggage trunks containing merchandise or unless the trunk was lost by the gross negligence of the defendant."

This baggage was checked from the Burnet House. In the testimony of Megrue, at page 46, is this testimony:

Q. Was there anything in the appearance of that trunk to indicate its use and contents to anyone not a traveling agent for a jewelry house or otherwise connected with the jewelry trade? *A.* It was what is known as a jewelry trunk and baggage men are usually able to judge of the contents from its shape and style.

Q. How do you know, that baggage men are usually able to judge of its contents from its shape and style? *A.* I have frequently had baggage men tell me the contents of my trunk, not knowing what line of goods I was traveling for.

And at page 48, the same witness:

Q. Please state how frequently you traveled over the defendant's railroad between Cincinnati and Louisville previous to the loss of your trunk and valise of jewelry as described in your original deposition? *A.* Probably three or four times.

Q. State whether or not they were business trips, and whether or not you had the trunk and valise of jewelry along with you on these occasions. *A.* They were, and I had my baggage with me. I had my trunk and valise with me.

Q. Do you mean the trunk and valise full of jewelry that were afterwards lost? *A.* I do.

Q. About how long before their loss were these trips made? *A.* From sixty to ninety days before.

Q. State whether or not upon these trips, before the loss of the jewelry, the trunk and valise mentioned were received and checked as baggage. *A.* They were.

Q. State whether or not you know anything touching the custom of the defendant, at the time of and before that loss by fire, as to the carrying of trunks of traveling salesmen as baggage. *A.* It was their custom to check such trunks as ordinary baggage.

Q. How about charging therefor? *A.* Baggage to the excess of one hundred and fifty pounds was charged extra for.

And on page 49 he says that during three or four trips that he speaks of, his baggage was checked from the depot baggage room; and on page 51, upon his re-examination, this question was put to him:

"On these trips did you ever notice in the baggage car or being received by the baggage master trunks of other traveling salesmen as baggage? *A.* I have.

Schwab, another witness commencing on page 52, gives this testimony:

Q. State whether or not previous to the 10th day of December 1880, you were in the habit of traveling over the road of the defendant company; if so, how long had you been traveling; how frequent were your trips and were you in the habit of taking sample jewelry trunks with you? *A.* Yes, sir; I traveled over it at those times and previous to that at an average of one trip backwards and forwards in sixty days at least, from 1870 on. I always when I traveled had my trunk with me. Sometimes I made trips on private business. I may have made a trip on private business, but not over once in five years, over that road.

He then describes the jewelry sample trunks and tells how they were made, and on page 53, that they are readily distinguishable from other ordinary sample trunks. And thereupon the following questions were asked him:

Q. How near that time did you pass over this road with your trunk—your jewelry-sample trunk? *A.* Probably within two or four weeks.

Q. How familiar were the baggage and trainmen in the employ of the defendant with sample jewelry trunks, and state how you know that they had any knowledge of them, referring now to the date of December 10th, 1880, and previously? *A.* Well, I should think the baggage-master could tell a jewelry trunk at once. Most baggage-masters knew my trunks and knew there was jewelry in them.

Q. Please answer the last part of my question. *A.* The jewelry trunks are generally unusually heavy, and the baggage-master who would take hold of them would say, "Hello, what you got in there—jewelry?" Which I couldn't deny, if they would ask me that question.

Q. State whether or not your sample trunks were received and checked as baggage by the defendant Co. always when you took them with you? *A.* I always had them checked as baggage.

Q. What was their custom when they weighed over a hundred and fifty pounds? *A.* They charged for overweight, perhaps 25 or 50 cts. a hundred pounds, according to the distance.

Q. How long had the defendant, to your knowledge, been receiving, checking, and carrying as baggage, for yourself and others, jewelry-sample trunks? *A.* Ever since I have been traveling. I cannot answer for others. I always had my trunk checked ever since I have been traveling.

Q. Have you never seen other traveling salesmen having jewelry-sample trunks checked as baggage by defendant's road, and over what time has your observation extended as to others? *A.* I have always met other jewelry travelers when I have traveled, or very often met them, on the same road, and noticed that they had their trunks checked the same as I did. My observation has extended over fourteen years.

And on page 55 he says they would not hesitate to check it, no matter what the shape of the trunk was, unless it was over-weight; and on re-examination, this question was put:

Q. Do you mean to say that your only knowledge that other salesmen had jewelry trunks checked as baggage was derived from a comparison of notes with them, or did you see it done in many instances? *A.* In a great many instances I saw it done and was right there when the baggage was checked.

On re-cross-examination, this question was put:

Q. But you don't know what they had in those trunks, of your own knowledge? *A.* Certainly I do.

Q. And it is those instances only when you stopped at the same hotel and sold to the same customers that you know that they had jewelry in their trunks? *A.* Those are not the only instances. When I would meet a jewelry traveler whom I knew personally it would make no difference if he would stop at the Galt House, in Louisville, and I at the Louisville Hotel, when we came to the depot we both had jewelry trunks beyond a doubt in my mind.

Q. But you could not tell that that friend had jewelry in his trunk unless you saw him pack it up, could you? *A.* No, sir; he might have sold his goods out and filled it with bricks.

Duff, at page 64, in describing the baggage that was in the car that night, says:

"I think there were two or three—I am pretty certain—clothing trunks—sample trunks; two or three sample trunks."

Q. What do you mean by sample trunks? *A.* They are an extra heavy trunk that traveling men have to protect their goods and keeping them from getting broke and rough treatment.

Q. Are these sample trunks easily distinguishable from the ordinary traveling trunks? *A.* Yes, sir; I think they are always made a little heavier, and you can tell them, unless there are some parties traveling that has made his trunks a little heavier to protect his goods.

Griswold, at page 72, says:

"My impression is that I ran on a passenger train for the company three years and six months. I think it is about that. I know that I never missed a day during all the time that I was employed by them."

Q. Do commercial travelers or drummers frequently, or at all, travel over that line of railway? *A.* Yes, sir.

Q. Were they frequent customers of the road or not? *A.* Yes, sir.

Q. Do you know the character of the trunks that are usually carried by drummers? *A.* Yes, I know the character of them.

Q. By appearance? *A.* Yes, sir; by their general appearance.

Q. Are they constructed differently from ordinary traveling trunks? *A.* Yes, sir.

Q. And by reason of their construction you could generally distinguish the drummers' trunks? *A.* Yes, sir. Sometimes you could not, but as a general thing you could. They got to charging them for extra baggage, and then they would use the other kinds of trunks to get out of paying for extra baggage and beating the road. As a general thing those that didn't get onto that used the old style.

Q. Do you know of any drummer getting his trunk changed for the purpose of beating the company? *A.* No, sir; I don't know of any. I heard of two or three cases.

Madden, at page 94, is asked if he had any recollection of any sample trunks carried on the trip in question; his answer was: "No, sir." Then the following information was elicited:

Q. You know a sample trunk when you see it, didn't you, and did at that time? *A.* Yes, sir; there are some of them very heavy and some of them you cannot tell them from any other trunk. There are some parties carries sample trunks that you cannot tell whether they are sample trunks or not.

Q. Do you mean that you can't tell whether they are sample trunks or not, or that you cannot tell their contents?

A. I mean that there are some drummers travel with trunks that you cannot tell whether they are sample trunks or not, and some travel with common zinc trunks.

Q. You mean, then, that sometimes drummers travel without what are known as sample trunks? *A.* Yes.

Q. But it is a fact, is it not, that where they do have sample trunks you know from their construction that they are sample trunks? *A.* Yes, sir.

And, on page 96, on cross-examination, the following were put:

Q. Does a sample trunk differ from any other except that it is a little stronger built or protected? *A.* Yes, sir; it differs in a great many—. There are different kinds of sample trunks; some canvass-covered; some sole-leather-covered, and so on; all kinds and sizes.

It is said that some uncertainty prevails at our law concerning a passenger carrier's liability for that which is not properly baggage, and yet it has been accepted as though it were.

Should merchandise be packed into a passenger's trunk and put on board a train, it may be presumed the carrier was misled into receiving it and hence that he could claim, to say the least, all the privileges of a gratuitous bailee. But where the conduct of the passenger was fair and open to the carrier, or his proper agent must have known what he accepted, the case is different. See

Schouler on Bailment, 349.
Story on Bailments, Sec. 571.
2 Redfield on Railways, 149 and 151.
2 Kent's Commentaries, 603.

The ordinary liability of a common carrier with reference to baggage is one of insurance of its safety.

Where merchandise is knowingly received and checked as baggage, the same liability attaches. See:

Macrow vs. Railroad Company, 6 Q. B., 619.

Cahill vs. London & Northwestern R. R. Co., 10 C. B. New series, 168.

Redfield on Carriers, 78 and notes.

2 Redfield on Railways, 46 and notes.

Hutchinson on Carriers, 685.

Thompson on Carriers of Passengers, pp. 520, 523.

Great Northern Railroad Co. vs. Sheppard, 8 Ex., 30.

Haines vs. Chicago &c. R. R., 29 Minn., 160, where a passenger presented a valise containing merchandise and it was checked as baggage, with no knowledge of its contents, it was said:

"If a passenger delivers to the carrier his baggage, a trunk or valise containing merchandise not his personal baggage, of which fact the carrier had no notice, the carrier would not, in the absence of negligence, be liable for its loss. Doubtless if the carrier had actual notice of the nature of the property and still received it as baggage, he would be liable."

In *Rawson et al. vs. Missouri &c. R. R. Co.*, 4 Mo. Appeals, 582, it is said:

"Where a passenger, intending to deceive the Railroad Company, carries merchandise as baggage, he cannot, in case of loss, recover from the Company as a *common carrier*. But where the Company, knowing it to be merchandise, permits it to be treated as baggage, the fact that it is merchandise will not prevent a recovery."

And in *Hoeger vs. The Railroad Co.*, 63 Wis., at page 100, where a traveling agent applied to the defendant to transport his sample trunks as baggage, and the Company, knowing their contents, received them and checked them as his baggage and carried them as such on a passenger train on which he rode, it was held that both parties were estopped

to claim that such trunks were not baggage and to be treated as such and not as ordinary freight.

It is said in *Stoneman vs. Erie R'y. Co.*, 52 N. Y., 429, that were a carrier of passengers, in addition to passage money demands and receives from a passenger compensation as freight for the transportation of packages containing merchandise and baggage, in the absence of fraud or concealment on the part of the passenger as to the contents of the packages, such carrier is liable, in the case of loss, for the merchandise as well as the baggage, and consequently, if the carrier knows or has notice of the character of goods taken as baggage and still undertakes to transport them, he is liable for loss although they are not ordinary baggage.

In *Sloman vs. The Great Western R'y. Co.*, 67 N. Y., at page 208, it is held that were a railroad company receives the trunks of a passenger with notice, that they contain property other than the passenger's baggage, and charges and receives extra compensation for their transportation, an agreement to carry the property as freight may be inferred therefrom and this fact will sustain a recovery for loss of the property. Where, in such case, the property is not that of the passenger and is in his hands as agent of the owner, and he makes the contract and pays the compensation for its carriage for account of and in the conduct of the business of his principal, an action is properly brought in the name of the latter to recover for the loss.

In this case, plaintiff's son was employed by him as a traveling agent to sell goods by sample. He had two large trunks containing the samples, different from the ordinary trunks, and valises for his personal baggage. He delivered the trunks to the baggage master in the railroad depot, and when asked where he wanted them checked to, replied that

he did not then know, as he had just sent a telegram to F. to know if he wanted any goods, if not, he wanted to send them to R. where he would meet some customers. Soon afterwards, he had them checked to R., paying two dollars, and received a check "Checked to R. Extra heavy." They were weighed, and no evidence was offered as to any regulation of the Company requiring an extra charge for passengers' baggage. It was held that the evidence justified the submission to the jury as a question of notice as to the contents of the trunks.

At page 214, it is said:

"The point is raised on appeal that the evidence does not show that the baggage master had authority to receive the trunks as freight. No such point was raised at the trial, nor is there any evidence that it was out of the usual course of business or contrary to the regulations of the company to transport freight on the passenger trains. The only evidence on that point is the testimony of the baggage master that he had nothing to do with the freight department."

In *Minter vs. The Pacific Railroad Company*, 41 Mo., 503, where a passenger delivered his trunk and a pile of carpeting to the baggage master of a passenger railroad train and received a check for the trunk and was told that no check was necessary for the carpet, "she would go safely", it was held, that the company was liable for the loss of the carpet although by the printed rules of the company the baggage master was forbidden to receive as passengers' baggage articles of merchandise, and it was further held, that a delivery to the servant or duly authorized agent of the common carrier who is in the habit of receiving packages, is a sufficient delivery to the carrier, and the acts of the agent within the usual scope of his employment will bind the employer regardless of any private instructions, unless the party delivering the package knew of the instructions.

And in *Waldron vs. The C. & N. W. R. R. Co.*, 1 Dakota, 307, where the plaintiff, son and two daughters held passage tickets on defendant's road and they presented three trunks and two boxes to the baggage master to be checked, they were all checked but one box which, having no convenient place to which to attach a check, was not checked, but the baggage master informed the plaintiff that it would go through as well without being checked. The box not checked was lost. It was held:

"If property is offered by a passenger and not so packed as to have the outward appearance of ordinary baggage or so as to deceive, or conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received, to be forwarded, the company is liable."

In *Pennsylvania R. R. Co. vs. Miller*, 35 O. S. 541, it is decided that:

"The implied undertaking of a carrier to insure the safety of baggage, does not extend to the contents of a trunk, consisting of samples of merchandise, which the passenger or traveling salesman, carries to facilitate his business in making sales. But the carrier, by taking the property into his charge and putting it into his warehouse for safe keeping, assumes the relation to it of an ordinary bailee, and he is bound to take such care of the property as a man of ordinary prudence would of his own, under like circumstances."

In this case the merchandise was packed with baggage in the ordinary valise so that there was no way of discovering its contents other than by information conveyed directly by the owner.

In *Jacobs vs. Tutt and another*, 33 Federal Reporter, 412, which was an action by a traveling salesman against the Receivers of the Wabash Railroad for damages for the loss of a trunk containing jewelry which he was selling, the

trunk was opened at the railroad station and a watch was sold to a boy present, and all this in the presence of the station agent. The trunk was then closed and the station agent checked it at Wasinde to Kansas City. The trunk reached its destination, but was stolen from the depot before it had been delivered to the plaintiff. It was held that the company was liable as for the loss of personal baggage.

In the *C. R. I. & P. R. R. Co. vs. Conklin*, 32 Kan., 55, where certain property consisting of a tent with poles, ropes and attachments, was delivered to the baggage master of the railroad company to be shipped and was shipped and forwarded as baggage, the property was checked as baggage but never accounted for. It was held that where personal property is received by a railroad company to be transported as baggage, and while in possession of the company is lost or stolen, the company is liable to the owner for its loss.

In the case of *Pfister vs. Central Pacific R. R. Co.*, 70 Cal., 169, decided that:

"Under section 2181 of the civil code, money belonging to the passenger of a railroad and intended for trade or business investment or transportation, and not for the use of the passenger while traveling, is not luggage."

In that case a county treasurer who purchased a passenger railroad ticket entitling him to a first-class railway passage was decided to have no right to carry, while in the passenger train, certain money which he was required by law to pay over to the State Treasurer at the place of destination, although the railroad company had for many years previously acquiesced in such a practice and accepted him as a passenger with knowledge that he had the money with him. The action was for damages for refusal to carry the plaintiff and his treasure. The Court at page 175, says:

"The theory of the plaintiff, that by having accepted him as a passenger with knowledge of the money he had with him, the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited." The numerous authorities cited—"were all cases in which the property was delivered to the carrier, and although not baggage, it was held that, having received it with knowledge that it was not the ordinary traveling baggage of the passenger, the *liability of a common carrier attached.*"

In *Hannibal R. R. Co. vs. Swift*, 12 Wallace, 262, which was an action brought by an army surgeon against the Hannibal Railroad Company to recover for the loss of surgical instruments lost when in course of transportation on the said road. The Court said:

"Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train, property other than the baggage of the passenger, for the contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending of course upon the station of the party, the object and length of the journey, and many other considerations. But if the property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier should not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

In *Railroad Company vs. Fraloff*, 100 U. S., 24, plaintiff was a wealthy lady, a subject of the Czar of Russia, who was traveling in America for her health. In one of her trunks there was a large amount of valuable lace. The

trunk, during the journey and while checked as baggage, was broken open and the contents stolen. She sued for $75,000 and was given a verdict for $10,000. The Court decided that this was not such baggage as would render the company liable as insurers, but on pages 27 and 28 the Court argues in detail in support of the proposition that as a condition precedent to any contract of transportation of passenger's baggage, the common carriers may require information as to its value and demand extra compensation for any excess beyond that which he may reasonably demand to be carried as baggage under the contract of carying his person, and consequently that any fraud or deception on the part of the passenger upon the carrier would exempt the carrier from responsibility, but that a failure to disclose the information is not in itself a fraud upon the carrier.—

The proposition with which we started would seem to be reasonably well settled by these decisions, and the following:

I. C. R. R. Co. vs. Trounstine, 64 Miss., 834.

Coward vs. E. T. V. & G. R. R. Co., 16 Lee, Tenn., 225.

Spooner vs. Hannibal & St. Joe R. R. Co., 23 Mo. Appeals 403.

Texas R. R. Co. vs. Kapp, 23 Am. Law Reg., N. S., 376.

Butler vs. Hudson River R. R. Co., 3 E. Smith, 571.

Hellman vs. Holliday, 1 Woolw. 365.

If merchandise is presented to a carrier to be checked and carried as baggage, the first question that arises is whether, so far as that merchandise is concerned, a contract

ual relation is established between the company and the passenger. If the company knows its character and receives it and checks it, it is still responsible as a common carrier. If it is ignorant of it and receives it, but without fraud or deception on the part of the passenger, it is still liable for negligence as a bailee, and the point now to examine is, what grade of negligence must the carrier be guilty of in order to render it liable.

It is said in *Pennsylvania Co. vs. Miller & Co., supra*, that it is not necessary to establish gross negligence.

It is also stated so in the case of *Curtis vs. R. R. Co.*, 74 N. Y., 116.

In the case of *Telegraph Co. vs. Griswold*, 37 O. S., 301, the distinction between gross negligence, as applied to carriers, is totally repudiated, citing *Wilson vs. Brett*, 11 Mees & W., 113, and the remark of Baron Rolfe, that he could "see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet."

In *Hinton vs. Dibbin*, 2 Q. B., 644, Lord Denman remarked, that:

"When we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between gross negligence, and negligence merely, any intelligible distinction exists."

See also *Beal vs. South Devon Ry. Co.*, 3 H. & C., 337; *Austin vs. Manchester Ry. Co.*, Eng. L. & Eq., 513; and comments of Parke, B., in *Wyld vs. Pickford*, 8 M. & W., 443.

In *Duff vs. Budd*, 3 Brod. & Bing., 177, it was held by Dallas, Ch. J., that "gross negligence is where the defendant or his servants have not taken the same care of the property as a prudent man would take of his own." And by Best, J., in *Batson vs. Denovan*, 4 Barn. & Ald., 21, that "they must take as much care of it as a prudent man does of his own property."

In *Grill vs. General Iron Screw Collier Company*, L. R., 1 C. P. 600, gross negligence was held to be a relative term and meant "the absence of the care that was requisite under the circumstances." It was the absence of such a care as it was the duty of the defendant to use under the circumstances of the case.

In *Beal vs. South Devon Ry. Co., supra*, it was held in the case of a carrier that "gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected of him;" Crompton, J., remarking, that "for all practical purposes, the rule may be stated to be that failure to exercise reasonable care, skill and diligence, is gross negligence." To the same effect is *Briggs vs. Taylor*, 28 Vt., 181, and *Shearm. & Redf. on Negligence*, § 16; all substantially agreeing with Willes, J., in *Lord vs. Midland Railway Co.*, L. R., 3 C. P. 344, that "any negligence is gross in one who undertakes a duty and fails to perform it." See also:

Gibblin vs. McMillan, Law Reports, 2 P. C., 317.

Shearm. & Redf. on Neg., 4th Ed., § 47.

Penn. R. R. Co. vs. Kuhn, 111 Pa. St., 430, at page 440.

In *Railroad Co. vs. Lockwood*, 17 Wall. 357, at page 382, it is said:

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities."

And in *Milwaukee R. R. Co. vs. Arms*, 91 U. S., 489, at page 493, it is said:

"It is insisted, however, that where there is gross negligence, the jury can properly give examplary damages. There are many cases of this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability of the carrier beyond the limity of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions."

Citing with approval the following language of Mr. Justice Curtis in *Steamer New World vs. King*, 16 How., 474:

"It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms 'gross negligence' or 'ordinary

negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what commissions amount to the breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned."

The court also quotes the following language of Justice Willes in the case of *Grill vs. The Gen. Iron Screw Collier Co., supra:*

"Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. 'Gross' is a word of description, and not of definition; and would have been only introducing a scource of confusion to use the expression 'gross negligence' instead of its equivalent—a want of due care and skill in navigating the vessel—which was again and again used by the Lord Chief Justice in summing up."

And this court says:

"'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but, after all, it means the absence of care that was necessary under the circumstances."

If we assume, therefore, that the baggage-man of the defendant received this trunk and checked it as baggage, the liability would be that of a common carrier provided he knew its contents. It would seem that the receipt by the baggage-master would bind the carrier. Most of the cases above quoted in relation to that character of liability seem to assume this latter proposition.

In *Railway Co. vs. Foster*, 104 Ind., page 293, it is said that:

"Where a baggage-man, as the agent of the railroad company, with general authority to receive the baggage of persons intending to go upon the company's trains, and does receive the baggage in violation of the rules and regulations of the company, the latter will be liable for the loss of such

baggage to the owner who has delivered the same in good faith unless the existance of such rule is brought to the knowledge of the owner."

And in *Ouimit vs. Henshaw*, 35 Vt.. 635, the same proposition is assumed to be the law.

See also

Minter vs. The Pacific R. R. Co.. supra; and
Waldron vs. C. & N. W. R. R. Co., supra.

If, on the other hand, it be assumed that the agent of the company received it without knowing its contents, but the passenger was guilty of no fraud or deception, then it would seem to be equally certain that the company is liable for its loss where not exercising such care as a prudent man would exercise in like circumstances with reference to his own property.

It will be observed that the finding that company was guilty of gross negligence which was set aside by the court was utterly immaterial. It had no meaning nor application to the case in view of the finding that the company did not exercise ordinary care under the circumstances, which this court has repeatedly said is negligence, pure and simple, without limit, and which in itself comprehends all that there is of negligence in the law.

In regard to the right of Aiken, Lambert & Co.. the owner of the goods, to recover, or their assignees, we desire to refer the Court to *The New Jersey Steam Navigation Co. vs. Merchants' Bank*. 6 How., 344. Also,

Penn Co vs. Miller. 35 O. S.. 541.
Sloman vs. G. W. Ry. Co., 67 N. Y.. 208.

Certainly, if the action is grounded on negligence, the contract becomes immaterial.

Pollock on Torts, 448, 449.
Pippin vs. Shepperd, 11 Price, 400.
Marshall vs. York, etc. R. R. Co., 11 C. B., 655.
Collett vs. Rwy. Co., 16 Q. B., 984.

In regard to the evidence of custom, it is submitted that it may be viewed in two aspects. In the first place as showing the course of dealing, mode of business with the customers of the company, extending over a long period of time, and known to the party who presented the trunk upon the occasion in question, and acted upon by him. It is familiar law that all rights, in all departments, are measured frequently by the understanding of the parties arising out of a course of business. For instance, rights of partners between themselves liabilities of partners as to the outside world, cases of parties holding out agents as having authority to act, railroad companies with reference to the carriage of livestock, and many other cases.

See *Story on Agency*, 45, 50, 54, 55, 56 to 50 inclusive, 84, 85, 102 and 103.
2 Greenleaf on Evidence, §§ 60 and 61.
Elkins vs. McClugh, Ambler, 184.
Insurance Co. vs. Semner, 52 Mo., 480.
Alcott vs. Railroad Co., 27 N. Y., 546.
Hoyt vs. Thompson's Exrs., 19 N. Y., 208.
Bank of U. S. vs. Dandridge, 12 Wheat., 64.
Cobb vs. Lunt, 4 Greenleaf, 503.
Dow vs. Green, 16 Barb., 272.
Lawson on Usage, 215, 216 and 217.
Hutchinson on Carrier, section 87.
2 Rorer on Railroads, 1097 and 1098.
32 Am. & E. R. R. Cases, 627.

Gt. Western R. R. Co. vs. Bunch, L. R. 13 Appeal Cases, 31, where the Court says, at page 37, per Lord Halsbury:

"I confess I should have been better satisfied if some evidence directed as to what was the practice of the particular railway company had been before us. But in this, as in other parts of the case, I must content myself with saying that if there had been nothing to enable the learned judge to infer what was the practice and from this to infer what was the contract, I am not at liberty to review his decision."

And at page 40, the Lord Chancellor says:

"The truth is, that in the conduct of business, more contracts are made by the settled course of business than are ever reduced into writing or even into spoken words had, and I think that when people hold themselves out as carriers and receive luggage at a place appointed to receive luggage for the purpose of shipping it, they must be understood to receive it as carriers unless they give notice to the persons from whom they received it in some other capacity."

See also *Pickford vs. Ryler*, 12 M. & W., 766; where a contract to ship goods received one day on the evening of the same day was implied from the course of dealing of the company.

Or, secondly, it may be regarded as important evidence as showing that not only no fraud was intended on the part of the passenger offering his trunk, but that in fact no fraud could have been perpetrated upon the company under the circumstances, because by its practice and course of business it had indicated clearly to the public that such information was a matter of indifference to it.

It is decided in *Kuter vs. The Mich. Cent. R. R. Co.*, 1 Biss., 30, as follows:

"As a general rule, a person who delivers to the carrier any article of property of which the latter is a common carrier, he is not bound to disclose the kind, quality, or value

of such property, and the carrier, in the absence of fraud or artifice on the part of the person making the delivery, is liable, notwithstanding no disclosure is made.

"But this rule must be taken and applied subject to the usual course of business, and this is a very important qualification of the rule itself. If in point of fact the property is put up or packed in such a manner as to deceive the carrier, then he does not become subject to the extraordinary responsibility of the common carrier. But if there be any doubt of the contents of the package or box, resulting from its examination or appearance, then the consequence of such doubt must fall upon the carrier if he do not make inquiry. The thing must be calculated to deceive, and if you believe that is was contrary to the usual course of business for money to be packed in the way proved in this case—that it was calculated to deceive the defendants as to the value of the contents, or that it operated as a fraud upon the defendants as to its value, as was intended, then they are not liable as common carriers.

"If, however, the defendants knew, as is insisted they did, that parties emigrating like the plaintiff, were in the habit of packing up valuable articles and money among their household wares, and from such knowledge might infer that those boxes of books might contain money, then it was their duty to make inquiry in order to relieve themselves from liability."

These words were said in a case touching the loss of baggage.

It is immaterial that the railroad company received no extra pay for the trunk: it could have charged for it.

In *Parmelee vs. Lowitz*. 74 Ills., 116.
Lemon vs. Chanclor. 68 Mo., 340.
I. & St. L. R. R. Co. vs. Horst. 93 U. S., 291.
Ry. Co. vs. Foster. 104 Ind., 293.
McGill vs. Rowland. 3 Barr. 452.
Giles vs. Fauntleroy. 13 Md., 127.
Graffam vs. R. R. Co., 67 Me., 234.